DUBLIN II Regulation
National Report

European network for technical cooperation on the application of the Dublin II Regulation

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1 Introduction

1.1 The Dublin II System: Perspectives and challenges at the European Level

The Dublin Regulation,[1] as its predecessor the Dublin Convention, was designed to ensure that one Member State is responsible for examining the asylum application of an asylum seeker and to avoid multiple asylum claims and secondary movement. It is confined to fixing uniform grounds for the allocation of Member State responsibility on the basis of a hierarchy of criteria binding on all EU Member States as well as Iceland, Norway, Switzerland and Liechtenstein. On the ten year anniversary of its entry into force this research provides a comparative overview of national practice in selected Member States on the application of this Regulation.

Our research shows that the operation of the Dublin system continues to act to the detriment of refugees, causing families to be separated and leading to an increasing use of detention. The Dublin procedure leads to serious delays in the examination of asylum claims and by doing so, effectively places peoples' lives on hold. The hierarchy of criteria is not always respected whilst Art. 10 is the predominant criterion used in connection with Eurodac. State practice demonstrates that asylum seekers subject to this system may be deprived of their fundamental rights *inter alia* the right to be heard, the right to an effective legal remedy and the very right to asylum itself as access to an asylum procedure is not always guaranteed. Reception conditions and services may also be severely limited for asylum seekers within the Dublin system in a number of Member States. There is an increasing use of bilateral administrative arrangements under Art. 23 and most States resort

1 Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, L 50/1 25.2.2003.

to informal communication channels to resolve disputes in the allocation of responsibility. Evidentiary requirements are very strict in some Member States, which in turn creates difficulties for asylum seekers in substantiating family links or showing time spent outside the territories of the Dublin system. A number of Member States also apply an excessively broad interpretation of absconding thereby extending the time limits for Dublin transfers further increasing delays in the examination of asylum claims. Furthermore the problems inherent in the Dublin system are also exacerbated by varied levels of protection, respect for refugee rights, reception conditions and asylum procedures in Member States creating an 'asylum lottery'.

The national reports provide an insight into the application of this Regulation at the national level whilst the comparative report outlines the main trends and developments at the European level. This research comes at a time when the Grand Chambers of both the European Court of Human Rights and the Court of Justice of the European Union have questioned the compatibility of the Dublin system with asylum seekers fundamental rights. In addition the EU institutions have recently reached a compromise agreement upon a recast Dublin III Regulation that introduces significant reforms including the creation of a mechanism for early warning, preparedness and crisis management. Despite these significant advances, the findings of this research demonstrates the continuous need to carefully evaluate the foundational principles of the Dublin system and its impact both with respect to asylum seekers' fundamental rights and Member States. It is hoped that this research will aid the Commission's review of the Dublin system within the forthcoming launch of a 'fitness check' and for any future dialogue on the assignment of responsibility for the examination of asylum claims.[2]

2 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum, An EU agenda for better responsibility-sharing and more mutual trust, COM 2011 (835), 2.11.2011 p.7.

1.2 Overview of the Dublin II Regulation in Austria

This report relies on desk-based research in statistics, literature and jurisprudence. The relevant authorities dealing with the Dublin II Regulation - the Asylum Court[3] and the Ministry of Interior[4] - were contacted as well to include their opinion on the report during the course of this research. Finally, the information is also influenced by the observations and experiences the author gained during the last five years working as a legal representative for asylum seekers.

In Austria the same institutional bodies which examine asylum applications also examine the applicability of the Dublin II Regulation for individual applicants which are the Bundesasylamt (Federal Asylum Office), the Asylgerichtshof[5] (Asylum Court) and the Verfassungsgerichtshof[6] (Constitutional Court). Every asylum applicant in a Dublin procedure has a right to appeal against an inadmissibility decision, but the appeal has in general no suspensive effect. For asylum applicants including Dublin returnees who apply in Austria for a second time within an 18 months period there is no effective remedy in practice. In these cases the asylum applicant can be deported even before he or she received an inadmissibility decision he or she could contest, but immediately after the responsible Member State agreed to take back the asylum applicant.[7] The legal protection at the Federal Asylum Office is very weak[8] and asylum applicants often suffer from a lack of information.[9] During the whole asylum procedure the asylum applicant has the right to basic social services as every other asylum applicant too.[10]

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3 Contacted on 09.12.2011, answer on 27.12.2011 by Mag. Michaela Mayerhofer.

4 Contacted on 09.12.2011, answer on 14.12.2011 by Peter Reich-Rohrwig; telephone call on 21.03.2012 and 27.09.2012; E-Mail on 27.09.2012.

5 Short: AsylGH.

6 Short: VfGH.

7 See chapter 2. and chapter 3.5.

8 Filzwieser: Die Anwendung des Art 3 Abs 2 Dublin-II-VO auf Griechenland, Migralex 03/2010, 82. See chapter 4.

9 See chapter 3.5.

10 See chapter 2.

The protection of vulnerable persons is only partly implemented – at the level of Art 2 and 3 of ECHR. [11] Family unity and the application of the humanitarian clause are also not implemented in a satisfactory way.[12] The situation for unaccompanied minors is in theory good, however in practice it is evident that there are many problems, especially regarding the length of time taken to reunify such minors with family members and for the official outcome from an age assessment test.[13]

There are positive aspects in the application of the Dublin II Regulation in Austria, too: There are no more transfers to Greece since the ECHR Grand Chamber Judgment *MSS v Belgium and Greece (App. No. 30696/09)*. Every asylum applicant, in the procedure in merits as well as in a Dublin procedure, has the right to a personalized interview – usually several interviews are conducted. The Federal Asylum Office has the obligation to request medical examinations if deemed necessary. If it is necessary is considered by the officer in charge who conducts the procedure. Time frames are in general respected, although there are cases where the admission procedure takes more than a year because of numerous inadmissibility decisions and protracted legal challenges.[14] The practice concerning detention improved significantly during the past years: Asylum applicants in a Dublin procedure are no longer detained on a regular basis at an early stage of the procedure - there have to be individual circumstances that give a reasonable suspicion that the asylum applicant will go into hiding. Finally a special detention centre for families has also been set up.[15]

Statistics show, that the numbers of incoming requests are about the same as those of the outgoing requests. This implicates that in Austria, the Dublin system does not seem to have a major influence on the number of asylum applications examined in Austria.

11 See chapter 3.4.
12 See chapter 3.5. and 3.2.
13 See chapter 3.4.
14 See chapter 3.3.
15 See chapter 3.6.

2 The National Legal Framework and Procedures

At the end of 2010, Austria hosted over 42,000 refugees and 25,000 asylum-seekers. The number of asylum applications filed in Austria had been declining in recent years as a result of restrictions introduced in the context of transposing EU directives into domestic law. However, with approximately 14,400 asylum applications received in 2011, Austria has registered an increase of about 30% in the number of asylum applicants compared with the previous year. As of May 2012 about 20,000 applications were pending. Over the last years the majority of applicants came from Afghanistan and the Russian Federation. As of May 2012, the gender breakdown of asylum-seekers in Austria was 74% male and 26% female, reflecting the general trend of the previous years. Since a major reform in 2005, the asylum system has seen further substantial changes leading to a complexity of the legal regime governing asylum in Austria, which has been widely criticised, including by NGOs active in the field. Further reform is under way to introduce one central office (Federal Office for Asylum and Issues of Foreigners - *Bundesamt für Fremdenwesen und Asyl, BFA*) dealing with asylum and immigration matters, with a representation in each one of the *Länder*. It is expected to start operating in 2013. During his visit the Commissioner was pleased to learn that the new office will co-operate closely with UNHCR in a quality management project.[16]

Austria does not use any national legislation to incorporate the Dublin II Regulation as it is directly applicable but instead refers in § 5 of the Asylgesetz (Asylum Law)[17] directly to it.

This states that the authorities issue an inadmissibility decision when Austria is not responsible for conducting the asylum

16 Muižnieks: Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Austria from 4 to 6 June 2012 (2012), 6 f.

17 Asylgesetz, BGBl 100/2005; short: AsylG.

procedure based on the Dublin II Regulation. In the same decision the authorities have to declare which Member State is responsible for the examination of the asylum procedure in merits.

The law also states that there should also be an inadmissibility decision in case another Member State is responsible for identifying which Member State is responsible for the examination based on merits.

Furthermore all Member States of the Dublin II Regulation are considered safe and the asylum applicant may find protection from persecution. There is an exception in case it is obvious that there will be a lack of protection, especially if it is notorious to the authorities, or if the asylum applicant brings evidence that there is a risk that he will not be protected properly. This real risk cannot be based on speculations, but has to be based on individual facts and evidence. This statement of danger has to be related to the individual situation of the asylum applicant.

According to § 10 (1) (1) AsylG a decision issued by the Federal Asylum Office has to incorporate an expulsion order in case the application for asylum is rejected for formal reason, which includes the inadmissibility decision in a Dublin procedure. Only when the expulsion order violates Art 8 of ECHR can it not be applied according to § 10 (2) (2) AsylG.

An application for asylum can be submitted personally, in principle in any police station or in one of the reception centres. Every asylum applicant receives first a red procedural card[18] which should be exchanged within five days for a green procedural card. This green card states that the asylum applicant is in an admission procedure. Once the substantive examination of the asylum claim is going to be in Austria he / she should receive a white card, so called residence card[19] which states that the asylum applicant has a legal right to stay in Austria during the asylum procedure.

There are different forms of protection in Austria: The recognition of the *refugee*[20] status is directly related to the 1951 Refugee convention.[21] *Subsidiary protection*[22] is guaranteed in case the asylum applicant is not individually persecuted in his/her home

18 In German: Verfahrenskarte (§ 50 Asylgesetz).
19 In German: Aufenthaltsberechtigungskarte (§ 51 Asylgesetz).
20 In German: Flüchtling.
21 § 3 Asylgesetz.
22 In German: Subsidiärschutz.

country for the reasons mentioned in the Geneva Convention, but in case a return would violate Art 3 or Art 2 of ECHR. This status in Austria is also applicable for persons with a serious medical condition, when an expulsion and the following lack of medical treatment in the country of origin can be considered as inhuman treatment or bear a danger to the person's life. *Tolerated stay*[23] is guaranteed if the asylum applicant who committed a crime in the country of origin or in Austria may face a prison sentence of more than one year (e.g. obstructing a police officer in the course of his duty, robbery, aggravated assault, drug crimes...), but when an expulsion might cause a violation of Art 3 of ECHR.

Finally there is also the possibility of a *residential permission*[24] in case the asylum authorities decide that an expulsion is permanently inadmissible. This status is applicable if neither the asylum applicant's life, nor his / her health is endangered in the home country, but still an expulsion would endanger the right guaranteed by Art 8 of ECHR. This might be applicable in case the asylum applicant founded a family life with a person who has a permanent right to stay in Austria or integrated well in the Austria society during the asylum procedure and additional the asylum procedure took very long time - without the asylum applicant being responsible for that delay.

The competent authorities are the Federal Asylum Office (Bundesasylamt) – a monocratically organised institution with several field offices, the Asylum Court (Asylgerichtshof) and the Constitutional Court (Verfassungsgerichtshof). There are two Federal Asylum Offices which are responsible for the admission procedure, called "Erstaufnahmestelle" (First Reception Centre): one in Traiskirchen in Lower Austria, one in Thalham in Upper Austria. For the substantive examination of the asylum claim the field offices of the Federal Asylum Office are responsible. They are located in Vienna, Traiskirchen, Linz, Graz, Salzburg, Innsbruck and Eisenstadt. The Asylum court is also monocratically organised and is located in Vienna and Linz.

When the asylum applicant is admitted to the substantive asylum procedure there will be personal hearings at the Federal Asylum Office. Depending on the case there can be only one hearing/ interview, but if there are more hearings necessary, for instance

23 In German: Duldung.

24 In German: Niederlassungsbewilligung, Rot-Weiß-Rot Karte, Rot-Weiß-Rot Karte Plus.

to discuss medical reports or outcomes of research in the home country, there can be further hearings conducted. If it deems necessary medical examinations will be requested by the officer in charge. At the end of the procedure the Federal Asylum Office will take a decision. If the asylum applicant does not agree with the outcome of the procedure there is the possibility to appeal against the decision within two weeks after receipt of the decision. In case refugee status or subsidiary protection is not granted, the asylum applicant will be allocated to a free legal advisor[25] provided by the state at the time of delivering the decision. This legal advisor can also help the asylum applicant appeal against the decision. Nevertheless, every asylum applicant has the right to choose a legal representative from an NGO or a lawyer on his own.

This system of legal counselling for asylum seekers free of charge has been introduced in Austria as of autumn 2011. Following a call for tender, two NGOs active in the field have won contracts to provide free legal aid, including interpretation and translation of documents. However, it appears that the quality of these services varies and that for instance, translation and interpretation are not always provided. A fee of € 220 is allocated per case file to the NGOs for the entire procedure. It has been pointed out however, that this fee must cover all costs including transportation and translation services. No increase is awarded for cases that are more time consuming such as unaccompanied children, abused women or other heavily traumatised asylum-seekers, with the quality of legal counselling provided being accordingly negatively affected. Furthermore the Commissioner was informed that support during the asylum procedure is limited as the legal counsellor is not required to accompany an asylum-seeker to a court hearing, or to actually draft the appeal which must be submitted in writing.[26]

If the asylum applicant appeals the Federal Asylum Office's decision, the asylum appeal is heard by the Asylum Court. This Court is organised in chambers (A, B, C, D, E, S) which are each responsible for certain groups of countries.[27] Within these chambers there are

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25 In German: Rechtsberater.

26 Muižnieks: Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Austria from 4 to 6 June 2012 (2012), 7.

27 Chamber A: the countries of Africa as far as they are not handled in chamber B; and Syria.
Chamber B: Serbia, Kosovo, Macedonia, Bosnia-Herzegovina, Albania, Montenegro, the Member States of the European Union, Iceland, Norway, Switzerland, Algeria, Egypt, Morocco, Western-Sahara, Tunisia, Libya.

panels consisting of two judges who decide collectively on the appeal.

The asylum appeal, contrary to the appeal in the Dublin procedure, has suspensive effect as long as the case is pending in court. The Asylum Court can call for another hearing and additional examinations if necessary. The possible outcome of this procedure can be the granting of a status, the denial of a status or the Asylum Court can revert it to the Federal Asylum Office for further investigations and a re-examination of the case. If the Asylum Court issues an expulsion order the asylum applicant has to leave Austria within 14 days. This period can be extended by the relevant Foreigners Police Unit. In case the asylum applicant does not leave Austria voluntarily in time he / she will be deported to his / her country of origin.

In case the asylum applicant seeks to challenge the decision of the Asylum Court and if he / she claims it is violating a right that is guaranteed by the constitution, he/she can appeal to the Constitutional Court. In that context it has to be mentioned that the ECHR is a part of Austria's constitutional law. This appeal does not automatically have suspensive effect. The asylum applicant has to be represented by a lawyer at the Constitutional Court. There is a possibility to apply for legal aid to get a lawyer for free in case an asylum applicant is not able to pay by himself / herself. However, Constitutional Court tends to refuse it in cases it sees little chances to succeed.

For the admission procedure, the appeal stages are the same, but the time frame to appeal against the Federal Asylum Office's inadmissibility decision (including Dublin decisions) is only one week and the appeal, has in general no suspensive effect, except when decided otherwise by the Asylum Court.

The Commissioner of Human Rights of the Council of Europe criticised that the time-limit of one week for appeals lodged against

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Chamber C: the countries of Asia, as far as they are not handled in any other chamber; the countries of America, except Canada, Australia and New Zealand.
Chamber D: Russian Federation, Georgia, Ukraine, Moldavia, Belarus, Kirgizia, Uzbekistan, Turkmenistan, Kazakhstan, Tajikistan.
Chamber E: Turkey, Iran, Iraq, Pakistan, Armenia, Azerbaijan, Israel, Jordan, Lebanon, Yemen, Kuwait, USA, Canada.
Chamber S: special procedures (also: Dublin procedures)
Asylgerichtshof: Geschäftsverteilungs-Übersicht für das Geschäftsverteilungsjahr 2012
(http://www.asylgh.gv.at/DocView.axd?CobId=31245)

decisions by the Federal Asylum Office to allow for deportation to another EU member state under the Dublin II regulation appears very short.[28]

Concerning social welfare and reception conditions,[29] the Basic Services Law (Grundversorgungsgesetz Bund) guarantees the asylum applicants at the admissibility stage, including potential Dublin applicants their social rights. The right for basic social services include accommodation, insurance, pocket money and food. A precondition for basic social services is that the person is in need of protection: Every asylum applicant is presumed to need this assistance unless there are indicators to the contrary. These indicators are for instance a formal obligation by a person who invited the asylum applicant to Austria to support them or any kind of funds the asylum applicant has in Austria. Hence he/she has the right to benefit from these social services until he / she leaves Austria again, even so in case the application has already been rejected based on the Dublin II Regulation.[30]

Asylum applicants in the admissibility procedure (such as asylum applicants in a Dublin procedure) are located in different living quarters than asylum applicants in a procedure based on merits, but hold the same rights regarding insurance, pocket money and food.

There are two Federal Asylum Offices which are responsible for the admission procedure, called "Erstaufnahmestelle" (initial reception centre): one in Traiskirchen in Lower Austria (EAST Ost), one in Thalham in Upper Austria (EAST West). These are specialised on conducting Dublin procedures. Located in Vienna there is also the Dublin department.

Concerning the costs of the Dublin II system for Austria, caused by consultation procedures, the conduction of the Dublin procedure, personnel, detention and transfer from or to the responsible Member State, the Ministry of Interior[31] declares that there are no public statistics available.

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28 Muižnieks: Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Austria from 4 to 6 June 2012 (2012), 8.

29 For details see chapter 3.6.

30 Schumacher/Peyrl: Fremdenrecht[3] (2007), 217 ff.

31 Parliamentary Interpellation XXIV.GP.-NR 10892/AB (16.05.2012).

In second instance the Asylum Court is responsible for handling the appeals against the Federal Asylum Office's decision. The Asylum Court in Vienna has a Dublin chamber as well as the Asylum Court in Linz (chamber S). This chamber has all together 18 judges who rule - different than in the asylum procedure in merits where two judges decide jointly - as a single judge on the appeal. The costs of the staff linked to the Dublin procedures cannot be analysed independently because the judges and other administrative staff are also working in other chambers dealing with asylum procedures based on merits.

Furthermore, the Federal Asylum Office has a General Policy and Dublin Department[32] which is located in Vienna. In the field of Dublin procedures this department is responsible for supervising the work of the initial reception centre's work. Moreover, it conducts all Dublin-In procedures and in response to a request of the Foreigners Police department all consultations with Member States concerning foreigners who did not apply for asylum. Located in this department there is also the state documentation[33] which provides country reports on Dublin Member States as well as country of origin information.[34]

Once an application for asylum is filed, the next step is a short preliminary interview by the police, on the circumstances on how the person entered Austria, the personal data and – very brief – also on the reasons he / she left his/her home country and the first country of entry in the EU. The asylum applicant then is fingerprinted, photographed and finally handed out a red card. With this red card required by law the asylum applicant is not allowed to leave the reception centre although they are generally open, otherwise he / she risks arrest. In practice asylum applicants are not hindered to leave the reception centre, but are permitted to leave it for short times only. This permission to leave the reception centre is formally against the law, so this practice may change again.

The Commissioner for Human Rights of the Council of Europe also noted that has not come across a case in which severe sanctions have been applied. However, he sees a potential conflict with the right to freedom of movement, which might also lead to

32 In German: Grundsatz- und Dublinabteilung.

33 In German: Staatendokumentation.

34 Ministry of Interior: Peter Reich-Rohrwig's answer via E-Mail on 27.09.2012.

the possible separation of families for close to a week where a part of the family may already reside in Austria.[35]

Not more than five days later should the asylum applicant receive a green card in exchange for the red card, that indicates that he/she is in one type of admission procedure, which might be a Dublin procedure, a procedure because the person comes from a safe state or if the matter has been decided with final effect. This green card doesn't allow the asylum applicant to leave the district where his / her accommodation is located, except in specific cases, for instance, to fulfil legal duties, to take part in a hearing at the court or to an administrative authority or to visit a doctor.

The Dublin Regulation may be triggered if there is a Eurodac-hit, if the asylum applicant has a passport with a visa for another Member State of the Dublin II Regulation, or if he / she admits that he / she entered the European Union via another Member State or if there is any other suspicion or circumstantial evidence which indicates that he / she entered via another Member State, for instance any kind of evidence or if a person is caught by the police close to a border or in a certain train coming from another Member State. Though there are other grounds applicable for determining Member State responsibility under the Dublin II Regulation these are the most common grounds applied in Austria.

Within 20 days after the application, the Federal Asylum Office (Bundesasylamt) has to either admit the asylum applicant to the procedure based on merits or inform him / her formally about the intention to issue an inadmissibility procedure as another state is considered responsible for the examination of the asylum claim.[36] In case an asylum applicant cannot participate in the asylum procedure, especially if he / she is in a hospital and cannot be handed out the information about the intention to issue an inadmissibility decision, the time frame of 20 days starts on the day of his / her release from the hospital.[37] In case the Federal Asylum Office does not inform the asylum applicant about its intention to issue an inadmissibility decision, the asylum application is examined in Austria. In general, there are also decisions from the Asylum Court

35 Muižnieks: Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Austria from 4 to 6 June 2012 (2012), 7 f.

36 See § 28 (2) Asylgesetz.

37 Asylgesetz 2005, Asylgerichtshofgesetz – Texte, Materialien, Judikatur6 (2011), 143 ff.

that claim that there is the possibility to take an inadmissibility decision even after the application was admitted to the procedure in merits and even after the period of 20 days expired.[38]

During the admissibility procedure there are interviews at the Federal Asylum Office regarding the fact that another state is held responsible, regarding family ties in Austria, regarding the physical and mental health of the asylum applicant and his/her reasons for refusing to return to the responsible Member State if applicable. In case of need, there is a medical examination conducted by a specialist. Concerning mental problems and general medicine the state has hired doctors for this function who are in the reception centre on a regular basis. For other medical problems the asylum applicants see a doctor in a nearby hospital.

In case there seems to be no obstacle against an inadmissibility decision such as a violation of Art 2, 3 or 8 of ECHR, the Federal Asylum Office will reject the application for Dublin reasons and will issue a decision. This decision contains the statement that the application for asylum is not conducted in merits in Austria and the responsible Member State has to be identified. The decision also contains a formal expulsion order to the responsible Member State. The decision also has to include the reasons for this decision.

An appeal against this decision is foreseen within seven days. And the state has to provide legal assistance. The responsible organisation (ARGE Rechtsberatung or Verein Menschenrechte Österreich) has to be assigned by an order at the same time as the inadmissibility decision is issued. Nevertheless every asylum applicant has the right to choose a legal representative from another NGO or a lawyer outside of these organisations.

As a first step after the appeal, the Asylum Court rules within seven days after receiving the appeal whether the decision will have a suspensive effect during the continuing procedure. If after seven days the Asylum Court neither issues a suspensive effect, nor accepts the appeal, the asylum applicant can be deported to the responsible Member State during an open procedure. Of course the Asylum Court can also issue a suspensive effect later on in the procedure; in case the asylum applicant was already deported he / she could return to Austria.

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38 Girod: Die 20-Tages-Frist im Zulassungsverfahren nach dem AsylG, Migralex 01/2012, 18f.

The Asylum Court also can accept the appeal within seven days after the receipt without granting suspensive effect. In this case the asylum applicant cannot be deported because he / she is formally in the procedure in merits. Still, there can be another Dublin decision as long as the time frame of Art 19 (4) Dublin II Regulation is still open.

A second scenario of the proceedings at the Asylum Court includes an acceptance of the appeal after the Asylum Court awarded suspensive effect. The consequences regarding the further proceedings (the procedure will be formally admitted but still there can be another Dublin decision) are in principle the same, except the fact that the period of Art 19 (4) Dublin II Regulation starts once again after the Asylum Court's decision.

In the third scenario of the proceedings at the Asylum Court - which is the most common scenario in practice - the Asylum Court does not issue suspensive effect. In most of these cases the Asylum court will refuse the appeal. This procedure can take up to six months but is mostly decided within two or three months. In these cases, asylum applicants are often deported before they receive their second negative decision. However, if there is finally a positive decision and the asylum applicant was still deported, he / she can return to Austria.

In case the Asylum Court accepts the appeal, the case is returned to the Federal Asylum Office for further investigations or for conducting the procedure based on merits. The reasons for accepting an appeal can be illegitimacy or lack of investigation.[39]

What exactly happens after the Asylum Court's decision depends on the Asylum Court's decision itself and the orders to the Federal Asylum Office which are contained in the decision.

In case the Asylum Court rejects the appeal, the asylum applicant has the possibility to appeal to the Constitutional Court, if he / she claims a right guaranteed by the constitution (which are mainly human rights and the right of equal treatment) has been violated. The Constitutional Court in Austria is only allowed to assess the points of law based on the information given during the procedure in before the lower authorities. It is not permitted to introduce new facts or circumstances before the Constitutional Court there is a prohibition. To appeal to the Constitutional Court

39 Girot: Die 20-Tages-Frist im Zulassungsverfahren nach dem AsylG, Migralex 01/2012, 22.

the presence of a lawyer is required. If the asylum applicant cannot afford one, he / she can apply for legal aid. However, the chances of success, i.e. to succeed with the appeal as well as to have access to a lawyer provided by the state, are very low and usually appeals are rejected for the reason that no constitutional right seems to have been violated.

When an inadmissibility decision is taken, usually within few days, the asylum applicant is a transferred to the competent Member State. These transfers are normally carried out without the –.asylum applicant concerned being informed on the time and the location, giving him/her no possibility to return to the responsible Member State voluntarily. This action could be said to be contrary to Article 19(2) of the Dublin II Regulation. Voluntary transfers are hardly every allowed by the Austrian authorities.

In case of an enforced return to the responsible Member State the police usually arrives very early in the morning, around 05.00 a.m. The asylum applicant is first transferred to a detention centre – since 2011 there is also a special detention centre for families. The asylum applicant has to stay there until the deportation, which usually takes place after one or two days. Depending on the responsible state and the number of persons being transferred, the transfer takes place by plane, by bus or by police car under escort.

3 The application of the Dublin II Regulation in Austria

Austria is a neutral Dublin Member State. That means that Austria has about the same amount of incoming and outgoing requests. In an arithmetic average of 2010 and 2011 Austria has only a difference of 46 requests between Incoming and outgoing requests.
All in all, Austria conducted 3085 Dublin procedures and transferred 808 asylum applicants to the relevant Member State in 2011. Compared to the amount of applications in 2011 (14 415 asylum applications) Austria initiates a Dublin procedure in approximately 21,4 % of cases, but in only 53 % of these proceedings another Member State is actually responsible and accepts to take the asylum applicant back. Out of 11012 applications for asylum in 2010, 2874 procedures were conducted as Dublin procedures, so Austria did not intend to conduct a in procedure in merits in 26,1 % of the cases. In 2010 in 62,1 % the Member States accepted the request.

The percentage of actual transfers compared to the number of requests is 25,2 % in an arithmetic average of 2010 and 2011. Although this number seems very low it is in line with the general statistics for the Dublin Member States, where 25,3 % of all requests finally lead to a transfer.

The most important Dublin Member States for outgoing requests for the years 2008 to 2011 are Poland, Greece, Hungary, Italy, Slowakia, Romania and Germany which each more than 100 requests per year. The most important Member States for incoming requests in these years were Germany, Switzerland, France, Belgium, Sweden, Italy and the Netherlands with each more than 100 requests per year in an arithmetic average of 2008 to 2011.

However, concerning other data related with Dublin II the Ministry of Interior is very reserved and seems to not have any statistics besides a Dublin-out statistic. Based on the Ministry of Interiors answer to the parliamentary interpellation XXIV.GP.-NR 10892/AB (15.05.2012) and XXIV.GP.NR-4429/AB (02.04.2010) there is no information on

- how many Dublin procedures were open in 2010 and 2011
- how many Dublin procedures were actually conducted in Austria
- how many asylum applicants in a Dublin procedure were later on admitted to the procedure in merits
- how many Dublin out cases were actually taken over by the responsible Member State
- how many asylum applicants decided to return voluntarily to their home country during their open asylum procedure
- how many asylum applicants were transferred back to Austria under the Dublin II Regulation
- the costs of the Dublin system in Austria (consultation procedures, personnel, detention, transfers to other countries and to Austria, ...)
- the duration of the Dublin procedures: neither an average, nor the longest duration is known by the Ministry of Interior
- how many unaccompanied minors were in a Dublin procedure and how many of them were admitted to the procedure in merits
- how many asylum applicants were admitted to the procedure in merits because of the humanitarian clause and how many applications due to Art 15 Dublin II Regulation Austria agreed to

The exact numbers and further statistical material from Eurostat and Austria's Ministry of Interior can be found in annex B.

3.1. The application of Dublin II Regulation Criteria

In general Austria respects the hierarchy of the criteria stated in Art 5 (1) Dublin II Regulation. At the beginning of each asylum procedure the asylum applicant's fingerprints are taken. If these have already been stored in the Eurodac-database, there will be Dublin consultations – this is the preferred initiation of a Dublin procedure. If there is no Eurodac-hit, the applicant is interrogated about his /her route from the respective country of origin to Austria. These interviews should provide hints about a possible stay in another Member State – in addition to police reports about common refugee routes, statements from other asylum applicants arriving at the same time or evidence such as train or bus tickets from another Member State – are used to start consultation procedures. If a person denies to have crossed another Member State, the Federal Asylum Office still asks several Member States (mostly Poland, Czech Republic, Italy and Slovakia) if there is a valid visa or residential permission.

Concerning illegal border-crossing there was a change of practice in 2011. Before the decision MSS vs. Belgium and Greece, Austria deported many asylum applicants to Greece, although they had neither fingerprints nor a residential permission there, but crossed the border illegally. In these cases Austria started a consultation procedure – based on the police's experiences with the routes of the refugees or the information the asylum applicant gave. Greece usually did not responded to that request, but the asylum applicant was expelled to Greece regardless.[40]

This practice changed: If an asylum applicant says he crossed the border to Greece illegally, was registered by the Greek authorities but did not apply for asylum, the Austrian Federal Asylum Office and Asylum Court no longer assume a theoretical responsibility of Greece.[41] The next Member State they cross illegally and often without being registered by the state's authorities is usually

40 See AsylGH 16.12.2010, S8 416.443-1/2010; AsylGH 06.12.2010, S22 416.465-1/2010; AsylGH 30.11.2010, S22 415.911-1/2010; and many others.

41 See also: Filzwieser/Sprung: Dublin II Verordnung³ (2010), 107, K11.

Hungary coming from Greece to Macedonia and Serbia), which is then considered to be the responsible Member State.[42]

Based on that practice the Constitutional Court[43] decided that Austria has to initiate proceedings to a preliminary ruling at the ECJ. In that procedure the question must be clarified, whether Greece is the responsible Member State, although the asylum applicant left the European Union for a short time (less than three months) and then entered another Member State.

However, there is serious inconsistency in the use of Art 8 before Art 14 Dublin II Regulation where the hierarchy of the criteria is partly not respected. These cases have to be decided by the Asylum Court and sometimes even by the Constitutional Court because the jurisprudence of the Asylum Court is contradictory too. In some cases Art 14 is used before Art 8 Dublin II Regulation within three months after the first family member was admitted to the procedure in merits.[44]

In other cases there is no such timeframe, but Art 8 Dublin II Regulation is used the day after the first family member was admitted to the procedure in merits.[45] This issue was in fact already cleared by the Constitutional Court,[46] but since this aspect of jurisprudence did not in the responsibility of the Asylum Court, the Constitutional Court now deals with this issue once again.[47]

Furthermore, concerning the application of Art 7 Dublin II Regulation before Art 10 Dublin II Regulation there is a systematic breach of the regulation: Art 7 clearly states that when *the asylum applicant has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a refugee in a Member State, that Member State shall be responsible for examining the application for asylum*. In these cases Austria systematically takes Art 5 (2) Dublin II Regulation into

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42 See AsylGH 29.03.2012, S3 422.460-2/2012/7E; AsylGH 07.05.2012, S4 421.164-2/2012; AsylGH 19.04.2012, S5 426.038-1/2012; AsylGH 18.04.2012, S7 425.624-1/2012; and many others.

43 See VfGH 27.06.2012, U330/12.

44 See AsylGH 05.01.2012, S2 423.086-0891-/2011/3E; AsylGH 19.04.2011, S3 418.562-1/2011/2E ; AsylGH 20.04.2011, S24 418.405-1/2011/2E.

45 See AsylGH 11.01.2010, S4 410.937-1/2010/2E; AsylGH 19.04.2010, S23 412.628-630-1/2010/2E.

46 See VfGH 27.04.2009, U136/08.

47 U 283-286/12; not yet (12.08.2012) decided.

consideration and expels the spouse because he / she was not married to the respective asylum applicant when he / she first entered a Dublin Member State (see Asylum Court 08.02.2010, S3 403.581-2/2010; Asylum Court 27.06.2011, S5 403.283-4/2011; and many others).

Persons who are refugees in other Member States are not placed in a Dublin procedure in case they apply for asylum in Austria. Still, the application will be refused due to § 4 Asylgesetz because the country where he / she has the status as a refugee is seen as a safe third state.

Generally, there is a serious problem with inconsistency in Austrian jurisprudence, also in the asylum procedures in merits. Whether an appeal is accepted or refused mostly depends on the judge. For example concerning Dublin procedures with Italy, chamber S16 states, that Italy has *"problems with capacity concerning accommodation of asylum applicants"* which makes it necessary to *"ask for an individual ascertainment from Italian authorities for accommodation of the asylum applicant who is a member of a vulnerable group"* (see Asylum Court 06.12.2011, S16 422.756-1/2011-5E and others). Nevertheless, in other chambers of the Asylum Court, even vulnerable persons were expelled to Italy (see Asylum Court 29.02.2012, S3 424.269-1/2012/5E; Asylum Court 11.04.2012, S6 425.764-1/2012/3E and others; Asylum Court 15.03.2012, S2 425.140-1/2012/3E; and many others).

3.2. The Use of Discretionary Provisions

3.2.1. The use of the Humanitarian Clause (Art 15 Dublin II Regulation)

In Austria, the humanitarian clause of Art 15 Dublin II Regulation is not automatically applied to cases where a person applies for asylum in Austria and wants to stay with his / her relatives, but should be used as a standard (see Asylum Court 28.01.2010, S1 410.743-1/2009/6E). Austrian authorities use this clause mostly in cases where the asylum applicant still is in another country and applies for a reunification with relatives in Austria.

According to the juridical doctrine[48] all siblings and all relatives in descending or ascending line fall under this provision. It also applies to less closer relatives (such as cousins) if there is a strong dependency. Yet there is a huge difference between literature and practice and if a person applies for asylum in Austria invoking Art 15 Dublin II Regulation, the provision although described by the jurisprudence as a standard practice will seldom be implemented in reality by the Asylum Court and the Federal Asylum Office. Siblings, parents of grown up children whatever their age or health condition are, grown up children whose parents live in Austria and even men who founded a family while they were in theory "aware of the fact that they would not be able to have a durable family life" are usually not admitted to an asylum procedure in Austria if another Dublin Member State is responsible. Only in very few cases of extremely serious health problems (in jurisprudence for instance dementia, a very advanced form of hepatitis C; but not a difficult form of epilepsy, cancer in a stable phase, stable HIV-infection), the Federal Asylum Office or the Asylum Court are applying the humanitarian clause.

In a very disturbing case the Austrian authorities expelled to Poland the father, a Chechen of a newborn child, the child having refugee status in Austria and ruled in the decision that he could apply for a family reunification from Poland according to Art 15 Dublin II Regulation. After he was deported to Poland Austria rejected his application and tore the young family apart for good:

48 Filzwieser/Liebminger: Dublin II-Verordnung - Das Europäische Asylzuständigkeitssystem² (2007), 107 ff.

his wife and child have no right to stay in Poland as refugees, and he has no right to stay in Austria as a refugee.

The main legal problem in such cases is the fact that the Austrian authorities base the legal reasoning of the expulsion order only on article § 10 of the Asylum Law, which itself refers directly to Art 8 of ECHR. Even though literature[49] says that the strict standards of Art 8 of ECHR are not applied in an expulsion order in a Dublin procedure, in fact, Article 8 ECHR is referred to but not applied while Art 15 Dublin II Regulation is also ignored.

§ 10 (2) (2) of the Asylum Law, which is applicable for all expulsion orders, so also in Dublin cases, states that in assessing the violation of Art 8 of ECHR the following points have to be taken in consideration:

- duration and legal title of the stay in Austria
- de facto existence of a family life
- protection of privacy
- level of integration
- links with the country of origin
- criminal convictions
- violations of the public order, especially regarding asylum and immigration law
- the fact that family life was established at a time, when the members were aware of the fact that they might not be able to maintain family life
- if the prolonged duration of the stay was caused by the authority's delay.

These criteria are based on decisions of the ECHR concerning Art 8 of ECHR and the Austrian Constitutional Court (VfGH 29.09.2007, B328/07 and B1150/07-9).

It is obvious that in most Dublin cases these criteria will be used at the disadvantage of the asylum applicant: In most cases the asylum applicant stayed only a very short time in Austria and the family life was interrupted for a period of time. If the private life is "worth being protected" it also includes a certain subjective opinion of the deciding judge and it is usually set in direct context with the theoretical awareness of a person that he/she may not be able to continue his/her family life. The subjective element which

49 Chvosta: Die Ausweisung von Asylwerbern und Art 8 EMRK, ÖJZ 2007, 852.

includes an absence of legal knowledge and understanding on why the family is being separated is usually not taken into consideration.

There is no statistical data available for the use of the humanitarian clause in Austria, neither for those asylum applicants who already applied for asylum in Austria, nor for applications due to Art 15 Dublin II Regulation from other Member States.[50]

So in summary, Art 15 Dublin II Regulation is a good theoretical background in the above mentioned Austrian literature,[51] but is in fact hardly ever used in practice because Austrian authorities mainly refer to Art 8 of ECHR.

3.2.2. Reference for Preliminary Ruling C-245/11

a. Facts

The applicant in the main proceedings ('the applicant'), a national of the Russian Federation, entered the territory of the European Union via Poland in 2008, where she made her first application for asylum. Immediately after that she entered Austria where she applied for asylum, too.

Her grown up son with his wife and three minor children live in Austria with refugee status. The daughter-in-law of the applicant was raped during the civil war in Chechnya and became infected with HIV. The applicant is the only person in the family who knows that her daughter-in-law was raped, which caused a relationship of trust between them. The daughter-in-law suffers from a severe form of post-traumatic stress disorder, receives permanent psychiatric and psychological supervision and is treated with strong medication. In addition she recently developed severe kidney problems and became paralysed on one side. As a result of her diseases, the daughter-in-law is neither in a position to manage her own household, nor can she care for her three children. Following the arrival of the applicant, who since then has taken principal responsibility for the children's care, the child welfare suspended temporarily a measure to place the children in official care.

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50 Parliamentary Interpellation XXIV.GP.-NR 10892/AB (16.05.2012).

51 Chvosta: Die Ausweisung von Asylwerbern und Art 8 EMRK, ÖJZ 2007, 852. Filzwieser/Liebminger: Dublin II-Verordnung - Das Europäische Asylzuständigkeitssystem² (2007), 107 ff.

b. Procedure before the national court

In July 2008 the Federal Asylum Office rejected the applicant's Austrian asylum application for the reasons of Dublin II after Poland accepted the request from Austria to take charge of the applicant. The applicant's appeal against the decision is the subject of the proceedings before the referring court, the Asylum Court.

The referring court has **doubts concerning the application of Articles 15 and 3 of the Dublin II Regulation** No 343/2003 (DR) and referred the following questions to the European Court of Justice for a preliminary ruling:

1. Must Article 15 DR be interpreted as meaning that a Member State not responsible becomes automatically responsible if the asylum seeker - under the above named circumstances - is both willing and able to support her daughter-in-law and grandchildren? If yes, does the same apply even if the Member State prima facie has not made a request in accordance with the second sentence of Article 15 (1) Dublin II Regulation?
2. Must Article 3 (2) DR be interpreted as meaning that the Member State not responsible becomes automatically responsible if the responsibility otherwise will result in an infringement of Article 3 or Article 8 of the ECHR (Article 4 or Article 7 of the Charter)? If yes, may more extensive notions of 'inhuman treatment' or 'family' at variance with the interpretation developed by the European Court of Human Rights, be applied?

c. State of procedure:

The order for reference was received at the European Court of Justice on 23.05.2011. The applicant, some Member States and the European Commission submitted written observations. Then there was a hearing on 08.05.2012.

At 27.06.2012 the Advocate General delivered the following Opinion:

First of all the Advocate General states, that both Article 3 (2) DR ('Sovereignty Clause') and Article 15 DR ('Humanitarian Clause') have been introduced because of the fact that that there

may be situations in which the determination of responsibility with a strict catalogue of criteria may have unacceptable consequences. Both clauses represent exemption clauses that derogate from the hierarchy of criteria and permit another Member State to bear responsibility for special reasons.

Both Article 3 (2) and Article 15 DR are special provisions for discretionary decisions, and their fields of application may overlap and they may be applicable in tandem. Article 15 is a special provision for discretionary decisions regarding family reunion on humanitarian grounds, irrespective of the place of residence of the asylum seeker, but it depends necessarily on having a family member in the territory of the Member States. The invocation of the right to intervene under Article 3 (2) DR may depend on others than humanitarian grounds.

1. **To the first question referred:**

   • **Article 15 (2) DR:**

   In the present case the General Advocate answers the question if Article 15 (2) can be relevant in the negative. Article 15 (2) specifies the essential situations to family reunion. A family reunion under this Article is only permitted in any of the cases that are listed and thereby the discretion is heavily restricted.

   Under the definition 'person concerned' the asylum seeker is meant and it is required that he depends on the assistance of the 'other person', which means a family member. According to the wording Article 15 (2) is not applicable to a case such as this one.

   • **Article 15 (1) DR:**

   By contrast, this provision gives the Member States discretion in individual cases, in which the Member State itself must weigh all the relevant factors, because the terms 'humanitarian' and 'family or cultural considerations' are undefined legal concepts open to flexible application to a wide variety of situations with a family connotation. Thereby the discretion is wider.

   First of all it is to answer, if the applicant can be considered to be a family member within the meaning of Article 15 (1) DR. This question is affirmed by the General Advocate on the grounds that there are also mentioned 'other depend

relatives' and thereby the narrow legal definition of the term 'family members' cannot decisive in this context.

The determined possibility examining an asylum application however might only crystallise into an obligation under particular circumstances, namely if otherwise there would be a serious risk of an unjustified limitation of the fundamental rights as enshrined in the Charter (Article 4 'prohibition of inhuman or degrading treatment' and Article 7 'protection of privacy and family life').

Article 4 of the Charter presupposes the infliction of physical or mental pain or suffering of sufficient intensity or duration. In the opinion of the General Advocate this is doubtful. The daughter-in-law lived in Austria for several years without the applicant, was granted asylum, and the applicant no longer lived in the same household.

An interference of Article 7 of the Charter could be justified, if the limitation is provided for by law and if it respects the essence of that right and the principle of proportionality. A lawful separation of the grandchildren from their mother as a result of child welfare measures cannot normally constitute an unjustified restriction of Art. 7 of the Charter. Consequently, only in exceptional circumstances, even in the event of a restriction of a fundamental right, the Member State can examine the asylum application under humanitarian reasons.

In addition, it is provided that a request to carry out such an examination from another Member State has been received and that the persons concerned consent. The requirement for a request can be explained by the need to coordinate the actions of the various Member States. This requirement cannot be waived even where a Member State has a duty in exceptional circumstances. In the case of no request the Member State with a duty to assume responsibility would in the light of an interpretation of Article 15 DR be obliged to inform the other Member State about the factual and legal situation and to seek its agreement.

2. To the second question referred:

• Article 3 (2) DR:

The General Advocate examines the question, under which conditions the right to intervene may turn into a

duty to intervene. The Member States must - as recent determined in the *judgment in the N. S. and Others* case - comply with the requirements of the Charter. The Member State may not transfer the asylum seeker to the Member State responsible, if it cannot be unaware that this would be an infringement of the rights guaranteed by the Charter. In such a case the Member State must ascertain whether one both the other criteria of Chapter III DR enables another Member State to be identified as responsible for the examination of the asylum application. If necessary, the Member State must itself examine the application.

Concerning a threat of infringement it must be ensured that the protection guaranteed by the Charter in areas in which the provisions of the Charter overlap with the provisions of the ECHR is no less than the protection granted by the ECHR. The extent and scope of the protection granted by the ECHR has been clarified in the case-law of the European Court of Human Rights, therefore particular significance and high importance are to be attached to that case-law.

Altogether the ill-treatment must attain a minimum level of severity to fall within the scope of Article 4 of the Charter (and Article 3 ECHR).

Article 7 of the Charter also protects family relationships that do not represent 'effective' family life within the meaning of the case-law of the European Court of Human Rights. However, according to the case-law of the European Court of Human Rights on Article 8 ECHR this provision presupposes the real existence of a family life and is to examine if close personal ties truly and actually existed.

In opinion of the General Advocate the case-law of the European Court of Human Rights to Article 8 ECHR can be transposed directly to the right to respect for family life guaranteed by Article 7 of the Charter. Accordingly, it must be assumed that family life within the meaning of Article 7 of the Charter is also predicated on actual and close personal ties existing between the persons.

d. The ECJ's decision

On 06.11.2012 the Grand Chamber of the Court decided that Art 15 (2) Dublin II Regulation is applicable in that case and similar cases.[52]

Since the purpose of Art 15 Dublin II Regulation is to permit Member States to derogate from the criteria regarding sharing of competences between the Member States in order to facilitate the bringing together of family members where that is necessary on humanitarian grounds it must be capable of applying to situations going beyond those which are the subject of Article 6 and 8, even though they concern persons who do not fall within the definition of family members under Article 2(i).

In a situation of dependence that Member State is normally obliged to keep those persons together. Member State may derogate from it only if such derogation is justified because an exceptional situation has arisen.

The competent national authorities are under an obligation to ensure that the implementation of Regulation No 343/2003 is carried out in a manner which guarantees effective access to the procedures for determining refugee status and which does not compromise the objective of the rapid processing of an asylum application. The objective of speed also explains why applying Article 15(2) is justified even where the Member State responsible has not made a request to that effect.

Where family members have duly proved the existence of a situation of dependence within the meaning of Article 15(2) the competent national authorities cannot ignore the existence of that particular situation and the making of a request such as that provided in Article 15(1) becomes redundant.

3.2.3. The use of Sovereignty Clause (Art 3 (2) Dublin II Regulation)

Concerning the sovereignty clause, in Austria the asylum applicant has the legal right to request the asylum authorities to implement it. The Constitutional Court (15.10.2004, G 237/03; VfSlg. 16.122/2001) ruled on the basis of case law from ECHR, that even in case of responsibility of another Member State of the Dublin

52 http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=req&docid=129325&occ=first&dir=&cid=10955

Regulation, the Austrian authorities are nevertheless bound to the ECHR. This means that in case of a risk of a violation of human rights, Austria has to use the sovereignty clause. This decision is applicable according to Art 2 and 3 of ECHR as well as Art 8 ECHR following an interpretation consistent with the constitution.

During the asylum procedure, the asylum applicant, his / her legal representative and the legal advisor have the right to request the application of the sovereignty clause, which nevertheless remains the prerogatives of the authorities. Either the decision is negative and thereby the authorities have to provide legal reasoning in their decision as to why the sovereignty clause was not used, or in case of a positive decision, a note in the asylum file should be included, explaining that the sovereignty clause was used and the reasons for this decision.

Currently, the main reason to use the sovereignty clause in applications relevant to the Dublin Regulation is for transfers to Greece, where there is a threat of a violation of Art 3 of ECHR. The reception conditions in a given country are always assessed by the country reports which are prepared by the "Staatendokumentation" (state documentation) which is located in the Federal Asylum Office. These country reports which also include reports on European Member States have a high evidentiary value (see § 60 Asylum Law) and should be based on a well-founded analysis of different sources.

However, these requirements were not fulfilled initially in the country reports on Greece. In this context the problematic role of the state documentation needs to be discussed: § 60 states the high evidentiary value of these reports, but at the same time did not fulfil the legal duties of making a well-founded analysis based on different sources. As the Asylum Court refers mostly to these country reports, their use is highly problematic.[53]

Poor general reception conditions do not automatically imply the use of the sovereignty clause. Even in Dublin cases with Greece it was only after a long fight with Austrian authorities that they changed the policy following the ruling, *MSS v Belgium and Greece (App. No. 30696/09)*. Currently for Austria the most important country with reception conditions that might violate Art 3 of ECHR is Italy, which has notorious and severe difficulties. Austria's argument in

53 Filzwieser: Die Anwendung des Art 3 Abs 2 Dublin-II-VO auf Griechenland, Migralex03/2010, 82.

these cases is based on the Reception Conditions Directive and the Member State's duty to fulfil them. The authorities usually argue in their decisions that there "might be some difficulties" but in fact the Commission has taken no infringement procedure for a violation of the Reception Conditions Directive. Thus the presumption that the asylum applicant will have his rights protected according to the reception conditions directive is recognized. Even with reports from NGOs it is hardly possible to convince the authorities that there are inhuman reception conditions in a certain Member State. The only exceptions to be found in the Asylum Court's jurisprudence concern the vulnerable persons.

In Austria there is also the possibility of using the sovereignty clause in case of a real risk of a violation of Art 8 of ECHR. These cases are – as described above in *b. Family unity* and *g. Humanitarian clause* and are very rare and usually only used for cases of risk of separation of the family due to Art 2 (i-iii) Dublin II and § 2 (1) (22) of the Asylum Law, when the family life already exists in the home country.

3.2.4. Accelerated Procedures

A Dublin procedure is always an accelerated procedure. There are also other types of accelerated procedure: In case the asylum applicant is a citizen of a safe country of origin (for instance Serbia, Kosovo, Bosnia and Croatia) [54] or - if he / she is a refugee in another Member State and applies for asylum in Austria – in these cases the Dublin II Regulation is not used. In both cases the application for asylum will be rejected because the asylum applicant comes from a safe country of origin or a safe third state. The Austrian authorities do not require consent of the asylum applicant to apply the sovereignty clause. Also in both scenarios the asylum applications will be examined in an accelerated procedure. There is no legislative framework for accelerated procedures in Austria but this is the national practice for such cases.

54 There are hardly have any asylum applicants from these countries any more. For instance there were in 2011: Kosovo 358, Serbia 183, Bosnia: 64, Croatia:0.

These procedures are usually decided by the first reception centre[55] and not in a field office[56] of the Federal Asylum Office. The whole procedure for persons who come from a safe third country takes about the same time as a Dublin procedure, approximately up to six months; the procedure for asylum applicants who come from a safe country of origin is even faster and often takes less than a week until a rejection decision is issued. Asylum applicants from a safe country of origin have two weeks to appeal, those who come from a safe third country, only one week. Furthermore in both cases an appeal against the Federal Asylum Office's decision has no suspensive effect, except in cases the Asylum Court explicitly rules in its favour within seven days of the reception of the appeal.

There is also a not legally regulated but in practice existing type of procedure, the so-called fast track procedure. This is in fact a political decision to put asylum applicants, usually from a certain country of origin for a certain amount of time in that kind of quick procedure in order to discourage other potential asylum applicants. The asylum applicant has, during that time the same rights as a "normal" asylum applicant in a procedure based on merits, but will receive his negative decision from the Federal Asylum Office within one or two weeks instead of around six to nine months.

Nevertheless, the asylum applicant has the same social rights as any other asylum applicant in a procedure based on merits and the appeal filed within two weeks after the reception of the decision usually has a suspensive effect.

Only under very strict circumstances the Federal Asylum Office can disallow the suspensive effect (see § 38 Asylum Law):

- In case the asylum applicant comes from a safe country of origin[57]

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55 Bundesasylamt Erstaufnahmestelle Ost (Federal Asylum Office, First Reception Centre East), Bundesasylamt Erstaufnahmestelle West (Federal Asylum Office, First Reception Centre West)or Bundesasylamt Erstaufnahmestelle Flughafen (Federal Asylum Office, First Reception Centre Airport).

56 Located in Traiskirchen, Vienna, Eisenstadt, Graz, Salzburg, Linz and Innsbruck.

57 See § 39 Asylum Law: Belgium, Bulgaria, Denmark, Germany, Estonia, Finland, France, Greece, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, The Netherlands, Poland, Portugal, Romania, Sweden, Slovakia, Slovenia, Spain, Czech Republic, Hungary, United Kingdom, Cyprus, Australia, Iceland, Canada, Liechtenstein, New Zealand, Norway, Switzerland.
See Verordnung der Bundesregierung, mit der Staaten als sichere Herkunftsstaaten festgelegt werden (Herkunftsstaaten-Verordnung - HStV),

- In case the asylum applicant has been in Austria for more than three months without applying for asylum, except in cases where he / she is not responsible for the delay of the application or the relevant situation in the country of origin changed drastically.
- In case the asylum applicant tries to mislead the asylum authorities about his identity, citizenship or the authenticity of his / her documents, even though he / she was informed about the consequences
- In case the asylum applicant did not bring forward a fear of persecution
- In case the reasons for leaving the country of origin are obviously untrue
- In case there is a residential prohibition, expulsion order or return decision enforceable before the asylum applicant applied for asylum

Even in these cases the Asylum Court can allow the appeal to have a suspensive effect within one week after the delivery of the appeal in case there is a real risk of a violation of Art 2 or 3 of ECHR. Due to an interpretation consistent with the constitution, the suspensive effect must also be allowed in case of a real risk of a violation of Art 8 of ECHR.

The last notable wave of fast track procedures started in summer 2011 and lasted about five months and concerned asylum applicants from Afghanistan and Pakistan. These procedures are even handled preferred even by the Asylum Court.

Dublin returnees in Austria are not in general processed in an accelerated procedure.

BGBl. II Nr. 177/2009: Serbia, Montenegro, Croatia, Macedonia, Bosnia-Herzegovina, Kosovo, Albania.

3.3. The Practicalities of Dublin Procedures

The six months general timeframe which is stipulated in Art 19 (4) of Dublin II Regulation is, in Austria easily extended to 18 months if a person absconds. An asylum applicant absconds often without even realizing it: In case he / she does not return to the reception centre in time in the evening or in case he / she misses a presence check[58] he / she will be automatically removed from the reception centre, and will have few possibility to be accommodated in a reception centre again[59] In these cases, the time frame is almost immediately extended.[60] Fighting in a reception centre will lead to the expulsion of the asylum applicant. Even if a person is in a detention centre, then released and not immediately accommodated in a reception centre again, the time frame will be prolonged to 18 months. In case an asylum applicant has only a homeless registration he / she always will be considered as "absconded" and the time frame will be extended.

A second source of concern concerning the time frame it that the Asylum Court often gives to an appeal a suspensive effect before reverting it.

Though suspensive effect of the appeal is good and necessary for the asylum applicant to properly submit his/her appeal to the Dublin II Regulation inadmissibility decision, what happens in practice is that there may be more than one inadmissibility decision issued by the Federal Asylum Office on the basis of Dublin if the case is reverted back thereby making the overall process a protracted one.

The Federal Asylum Office often takes an inadmissibility decision more than once –which affects the time frame as stated in of Art 19 (4) Dublin II Regulation by restarting it each time – which leads to Dublin procedures to take one year or even longer before there is finally a procedure based on merits or a final inadmissibility

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58 So called «Anwesenheitskontrolle»: «: The asylum applicants get a note, which tells when the reception centre will check the presence of the asylum applicants. This check takes place about once in 48 hours. At this certain time every asylum applicant has to be in his / her room to confirm that he / she is still in the reception centre and the bar code which is on the green card will be scanned as a prove that a person was here.

59 The law says they have to receive a decision about this. In fact nobody receives a decision he could contest when he is not allowed to enter the accommodation any more. Some people manage to get back in after some phone calls and interventions by an NGO, others are homeless then.

60 There is no possibility to appeal against it.

decision. This practice is a result of the ECJ's decision in the case of *Petrosian.*[61]

This practice arising from the Austrian's repeated examination of Dublin II claims following appeals and re-establishing new time limits following the *Petrosian decision* is clearly against the intention of the Dublin II Regulations and in order to avoid the category of refugees so called "in orbit" who do not have a procedure based on merits for years. From a financial point of view it also seems not to be very economic to conduct for more than one year, an admission procedure with several hearings, medical examinations and investigations.

In case the time frame expires during the admissibility procedure, the asylum procedure will be immediately admitted to the procedure based on merits. In case the timeframe for a Dublin decision expires in an asylum procedure which is not pending the asylum applicant must apply for asylum once again. Usually these applications are admitted to the procedure based on merits a few days after.

If an asylum applicant stays outside the EU for more than three months and is able to prove it, he / she has quite good chances to be admitted to have their asylum claim examined in Austria In Austria according to Art 16 (3) Dublin II Regulation applied by the Asylum Court at appeal stage – the chances at the first instance Federal Asylum Office are very low. It is important to prove that the person left the EU as well as prove the duration of the stay outside. Ideally this evidence is provided by: documents from an authority from another state, documents from an NGO which provided assistance when leaving the country, or ideally a certificate from the former responsible Member State who registered the departure of the asylum applicant.

There are some known cases where the Austrian Federal Asylum Office deprived the former responsible Member State from certain important information. In these consultation procedures the request only stated that the asylum applicant "claimed to have left EU" for a certain number of months and that this "is not credible" – without ever or only partially mentioning the evidence presented during the procedure. In these cases the Asylum Court reverted the case to the Federal Asylum Office because the consultation procedure was considered illegitimate.[62]

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61 See chapter 3.9.

62 See AsylGH 24.03.2010, S1 404.524-2/2010/2E; AsylGH 16.04.2009, S15 315.092-3/2008/2E and others.

The most problematic aspect about the discrepancy between the practice of the Federal Asylum Office and the Asylum Court are the effective remedies for asylum applicants who apply for asylum a second time within 18 months after their last expulsion. As already described in *f. Effective remedy* these asylum applicants are usually deported to the "responsible" Member State even before receiving a decision they could challenge. For these asylum applicants chances of admission of the procedure are much smaller than for those who only applied for asylum in other countries.

Circumstantial evidence is used on a broad basis in Austria: In case a person is caught by the police at a routine control in a train coming from a certain Member State, if a person is caught by the police in a village close to the border, if the asylum applicant is caught in the vehicle of a people smuggler with a certain citizenship or license plate and in case when searching the asylum applicant and his / her luggage for evidence (food, bills, medicine, ticket) from another Dublin Member State are discovered, there will be Dublin consultations with the relevant Member State.

In summer 2011 this practice seemed to increase: Austria started an intense police action in cooperation with Hungary and Slovakia to track down people smugglers which has as side effects that Austria conducted more Dublin procedures with Hungary. Greece being the first country most asylum applicant enter EU through is mainly ignored, as fingerprints from Greece are not incorporated in the Eurodac system.

Concerning other evidence the Austrian authorities are very cautious:

To prove the family status in case a family did not arrive simultaneously in Austria every asylum applicant must have mentioned the other family member before in his / her asylum procedure - even in other Member States where they might have applied for asylum before. Marriage certificates or birth certificates are required on a regular basis. Dependent of the country of origin these documents are surveyed by the Federal Bureau of Criminal Investigation[63] to prove authenticity. DNA-tests are often required.[64] Additional, in case there are doubts of the family status there are hearings conducted to see if the family member deliver consistent statements concerning their family life.

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63 In German: Bundeskriminalamt.

64 The asylum applicant first has to pay the DNA-test by himself / herself. In case the DNA-test is positive and the asylum applicant is located in Austria, the asylum applicant can apply to get the costs refunded.

3.4. Vulnerable Persons in the Asylum Procedure

3.4.1. General legal framework for vulnerable asylum seekers in Austria

There are no specific regulations for vulnerable asylum applicants in Austria – these were eliminated from the law in 2005. § 30 Asylum Law states, that there shall not be rejection of the procedure based on merits in case it seems very likely that a person suffers from a psychological condition caused by torture or a similar incident, and that this condition prevents the asylum applicant to administrate his interests in the asylum procedure or that there is a real risk of permanent damage or remote damages in case of a transfer to the responsible Member State. However, this is not applicable for an inadmissibility decision according to the Dublin II Regulation.

Under Dublin in Austria the only human rights standards concerning the whether a Dublin transfer should be carried out or not are Art 2 and Art 3 ECHR – the illegitimacy of an expulsion order is legally directly linked to ECHR. There is a strong correlation between the reception conditions in a certain country, the individual's vulnerability and the possibility of a violation of ECHR which is – though not explicitly part of the law – defined by the jurisprudence.

The Constitutional Court in its jurisprudence has considered vulnerable persons a single mother with three children; a family with three children and a pregnant mother; a family with three children where the mother had a psychological condition; a single mother with four minor children. If this vulnerability criterion affects the possible application of Dublin, the decision depends mainly on the reception conditions in the responsible state.

According to the explanatory memorandum of the law, only the foreigners police in charge of a transfer have to examine if the transfer is also in accordance with Art 2 and Art 3 ECHR. However, the recurrent jurisprudence of the Constitutional Court and the Asylum Court points out that the asylum authorities have to examine – if it is indicated – if there is a risk of a violation of Art 2 or Art 3 ECHR in case of a transfer. According to the reading materials of the law as long as a violation of Art 3 or Art 2 ECHR

seems likely to occur in case of a transfer, the transfer shall not take place as long as the danger of violating the ECHR remains. For instance there should be no transfer of women in advanced stage of pregnancy, persons who cannot be transported and critically ill persons.[65]

It is still problematic that the foreigners police keep on referring to the asylum authorities decision as something they have to execute without conducting a serious inquiry themselves.

To determine if the person is vulnerable or has a medical condition which may cause a violation of Art 3 or Art 2 of ECHR in case of transfer, the asylum authorities – most of all the Federal Asylum Office – have to conduct the necessary medical examinations if it seems indicated. These indicarots may be oral information by the asylum applicant, medical diagnosis from a doctor outside or inside the reception centre or observations by the asylum officer or a prison guard in a detention centre.

As a standard procedure for every asylum applicant an X-ray of the lungs is taken to detect tuberculosis. Every other medical examination depends on the individual circumstances of the claim.

In case the information provided by the asylum applicant is not considered well-founded to allow a legal subsuming under ECHR, the Federal Asylum Office has to order an examination by the public medical officer present in the reception centres.[66]

If there is a clear indication for the necessity of a medical examination but no medical examination took place, or in case it did take place but it did not bring a clear result allowing subsuming under ECHR and further examinations would be necessary, this is considered a failure of investigation which can then be argued in an appeal in case of an inadmissibility decision under Dublin.

For these persons in general still the Dublin II Regulation is applied, even in cases where they are considered to be vulnerable.

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65 Asylgesetz 2005, Asylgerichtshofgesetz – Texte, Materialien, Judikatur6 (2011), 151 ff.

66 § 18 Asylgesetz: The Federal Asylum Office and the Asylum Court has to ensure in any stage of the procedure that all relevant information for the decision is provided as well as full information and prove by the asylum applicant is completed. If necessary, the evidence has to be organized by the authorities themselves.

3.4.2. Unaccompanied minors

The Commissioner for Human Rights of the Council of Europe notes that since 2011 the number of unaccompanied minors from Afghanistan has increased considerably. Their number is reported to be currently about twice as high as the number of special places with adapted services foreseen for unaccompanied children in the Federal Reception Centre East. This raises the issue of whether all unaccompanied asylumseeking children under the current circumstances benefit from the child-adapted services as originally planned for. Unaccompanied asylum-seeking children are in principle appointed a guardian. During his visit the Commissioner learned however that gaps remain for children at the admissibility stage and for those whose cases have been declared inadmissible or who are subject to being returned to another EU member state under the Dublin II regulation.[67]

The fact that an asylum applicant is an unaccompanied minor does not result in an inadmissibility decision or make a transfer to another country illegitimate. The Dublin II Regulation is still applicable. Concerning family tracing and Art 6 Dublin II Regulation, please find the information in *b. Family Unity*.

An asylum applicant is capable of managing the legal matters in his asylum procedure once he reaches 18 years, but must be 16 years old during the procedure at the foreigners police law (see § 16 FPG). So in the asylum procedure, which is regulated in Asylum Law the asylum applicant is capable of managing the legal matters after he / she reached 18 years. Concerning detention, the execution of the expulsion order and other measures which are regulated in foreigners police law the asylum applicant is legally capable of managing the legal matters when he / she reached 16 years.

Neither the asylum law nor the foreigners police law refer directly to the necessity of an examination of the best interests of the child.[68]

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67 Muižnieks: Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Austria from 4 to 6 June 2012 (2012), 7.

68 Menschenrechtsbeirat: Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren (2011).

In case the authorities have doubts about the minor's age given by the asylum applicant and if he / she has no unobjectionable evidence about his/her birth date, the Federal Asylum Office may undertake medical examinations to determine the age (§ 15/1/6 Asylum Law). These investigations consist of examinations by a dentist, examination of the body – especially regarding the development of sexual organs and body hair and x-ray of the carpal bone. These examinations, especially the x-ray, are highly criticised by Menschenrechtsbeirat, NGOs and the Medical Association[69].

There are also cases where the Federal Asylum Office recorded the age of the asylum applicant registered in another Member State the asylum applicant might have been before entering Austria, regardless the method this other country used to ascertain the age or the reasons why he / she claimed to be of full age or a minor in this state.

Furthermore, in case an asylum applicant is declared being of full age, his birth date will be "corrected" to 1st January of the fictive year the age has been diagnosed. This has been widely criticised, as this may cause the asylum applicant to be even one year older than the age determined by the medical examination. This practice is based on a decree from 18.12.2009.[70]

An unaccompanied minor automatically is assigned a legal advisor as his legal representative in his asylum procedure. This legal advisor is either from Verein Menschenrechte Österreich or from ARGE Rechtsberatung. This legal advisor has to maintain the child's rights – the minor himself cannot take any legal action himself (see § 9 AVG, § 16/1 Asylum Law, § 21/2 ABGB).

Due to Menschenrechtsbeirat[71] (Human Rights Board) it is problematic that these legal advisors are only responsible for the asylum procedure and do not have whole custody of the child. Furthermore, legal advisors are not required to have special expertise with minors. For the qualification requirements of the legal advisors see chapter 3.5.

In case an unaccompanied minor is formally declared as a person over 18 years by the responsible officer of the Federal Asylum Office after a medical examination, his legal representative is immediately

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69 In German: Ärztekammer.

70 Lukits/Lukits: Die Altersfeststellung im österreichischen Asylverfahren, Migralex 01/2011.

71 Menschenrechtsbeirat: Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren (2011).

withdrawn from his case. This raises serious concerns as there is no possibility to fight this decision separately – this is only possible in an appeal against any decision: an inadmissibility decision or a negative decision in a procedure based on merits. The result is a lack of legal protection.[72] Legal Representatives should continue to represent the disputed minor whilst they appeal this decision on age determination.

Moreover, there is a problem concerning the way the asylum applicants are confronted with the outcomes of the examinations: According to a report by the Menschenrechtsbeirat, they are not handled in an appropriate manner for children. Many minors have reported they felt ashamed, badly informed and were afraid during the medical examinations.[73]

3.5. The Rights of Asylum Applicants in the Dublin Procedure

3.5.1. Right to information

When a person seeks asylum he / she receives three different information sheets during the preliminary interview: The *orientation information sheet* gives a short overview on the course of action in the asylum procedure. The *first information sheet* explains the procedure in the initial reception centre which includes information about the Dublin Regulation and the Dublin procedure too. Finally the *information sheet about the rights and duties of an asylum applicant* is handed out. For the procedure at the airport there are other specially adapted information sheets, which explain the Airport procedure.[74]

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72 Lukits/Lukits: Die Altersfeststellung im österreichischen Asylverfahren, Migralex 01/2011.

73 Menschenrechtsbeirat: Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren (2011).

74 In German: Flughafenverfahren (§§ 31-33 Asylgesetz).
This type of procedure is only applicable for procedures in merits or procedures of persons in a safe third state procedure when UNHCR agrees on that, but not for Dublin procedures. The Airport-procedure is an accelerated procedure which

These information sheets are widely criticized: It is considered that for the average asylum applicant there is too much text, that the sentences are too long, that difficult formulations dominate the text and that the content is based on structure which is not logical. So the aim of informing the asylum applicants properly is not reached according to the opinion of Netzwerk SprachenRechte.[75] The information of this network on the information sheets has not been changed, except some adaptations according to the new law.[76]

In a research project in 2011 on the reception centre Traiskirchen, UNHCR[77] found a serious lack of information concerning the rights for unaccompanied minors – which may be appropriate for them, may, however, be a problem for adult asylum applicants. This report points out, that at the beginning of the procedure there is limited information: At the onset of the first interview by the police asylum applicants did not receive information about the handling of the procedure, the authority's expectations of the asylum applicant; that the content of the interview is confidential; the duty to tell the truth, to cooperate with the procedure and the function of the protocol. The information sheets were only handed out to some asylum applicants during the first interview and not all of them.

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also includes a shorter period to apply against a decision from Federal Asylum Office (one week instead of two weeks). The Asylum Court has to decide upon the appeal within two weeks and there has to be a hearing by the Asylum Court. An application for asylum can be only refused in an Airport-procedure in case there is no sign that the asylum applicant shall be recognized as a refugee or shall receive the status of subsidiary protection and
1. tried to mislead the authorities about his / her identity, citizenship or authenticity of his / her documents although he / she was informed about the negative consequences
2. the asylum applicant's claims about the persecution are obviously untrue
3. the asylum applicant did not claim any persecution at all, or
4. the asylum applicant comes from a safe country of origin
See also: Schumacher/Peyrl/Neugschwendtner: Fremdenrecht4 (2012), 268.

75 Netzwerk Sprachenrechte: Stellungnahme zu den Erstinformationsblättern BAA "Erstinformation über das Asylverfahren", "Merkblatt über Pflichten und Rechte von Asylwerbern" und "Orientierungsinformation für die Erstaufnahmestelle" (2006).

76 Austrian Asylum Law changes frequently, at least once a year, sometimes even twice.
These changes are always taken over into the information leaflets, but the old parts which did not change stay in the same way. The new parts might be written in the same style which is hard to understand for the average asylum applicant.

77 UNHCR: UNHCR-Beobachtung polizeilicher Erstbefragungen unbegleiteter Minderjähriger in der Erstaufnahmestelle-Ost (2011).

The outcome of an EFF-funded project from Netzwerk SprachenRechte and UNHCR in 2008, called komm.weg[78] criticised generally, that the *information provided by the first reception centres are neither comprehensible, nor sufficient*. Furthermore *central issue of passing on the information are time and trust*. The information sheets cannot be understood by the asylum applicants for reasons of language and style – asylum applicants with a basic level of education are affected the most.

The provision of free legal advisors is also problematic because of lack of time and competent interpreters, but also due to a lack of trust by the asylum applicants for the legal advisor, considered too close to the Federal Asylum Office. They have their offices within the building of the Federal Asylum Office and their function is only to pass on information about the procedure objectively - and not to assist the asylum applicant in the procedure. SprachenRechte also pointed out that these legal advisors are often neither accessible for the asylum applicants nor properly communicate them for proper representation. The quality of the information provided by the legal advisor depends on the understanding of the work by the advisor himself.

To become a legal advisor a person has to

- have successfully studied law or
- any other study at university which has a duration of at least four years and then worked for at least three years in the field of the law relating to foreigners or
- worked for at least five years in the field of the law relating to foreigners

There is no other special training for legal advisors.

Other asylum applicants are often a more central source of information, even though it can be problematic as not every information passed on is correct. Finally the *most important moment of passing on the information is the time before a person has the first interview*. The asylum applicant is often informed wrongfully by the smuggler and other asylum applicants and may retain this for the whole admission procedure because the information provided by the Federal Asylum Office and the free legal advisors comply only with the law, and not with the purpose of informing the asylum applicant properly. It should be important to inform the asylum

78 Plutzar: Ergebnisse der Studie komm.weg – Kommunikationswege in Erstaufnahmestelle für AsylwerberInnen (2008).

applicant before he / she has the first interview carried out by the police on how the asylum process will be conducted, what asylum means and under which circumstances there are chances for success

The same report from UNHCR also points out some difficulties with the information sheets: In the case of an asylum applicant who cannot read, the legal adviser and the officer in charge asked him to find somebody to read the leaflet out to him. The legal advisor and officer did not help the applicant himself/herself with reading the information leaflet. Another asylum applicant received the information sheets in Portuguese instead of English.[79]

3.5.2. Family unity in the Austrian asylum procedure including the Dublin procedure

When the asylum applicant asks for asylum he / she has a first interview at the police which strictly follows a questionnaire. This questionnaire contains all kind of family relations: those in the country of origin, in Austria, in other EU Member States as well as other close relatives (parents, siblings, children, spouse) in other countries.

The legal construction of § 2 (1) (22) of the Asylum Law has the same scope as Art 2 (i-iii) Dublin II Regulation: parents of a minor child, spouse in case the marriage already existed in the country of origin (also homosexual formally recognised marriage or legally registered partnership in the country of origin) minor and unmarried children.

Partners from stable unmarried relationships are usually considered as family members in case they come from a country where it is common not to have a marriage certificate, such as Chechnya and Afghanistan. Such a "stable relationship" is considered especially in case there was some kind of marriage ritual, there was a common household in the home country and of course in case they have children. Only in cases there are doubts that this is in fact a stable relationship based on the hearings conducted with the asylum applicant, for instance grave contradictions concerning the family life, they will not be considered as family

79 UNHCR: UNHCR-Beobachtung polizeilicher Erstbefragungen unbegleiteter Minderjähriger in der Erstaufnahmestelle-Ost (2011).

members. In case the couple already has children the procedure will be conducted as a family procedure according to § 34 of the Asylum Law and the whole family will receive the same decision - also in the Dublin procedure.

However, within the Dublin procedure even family members who are not included in the legal definition of a family member, are rarely separated, especially if there was a common household in the country of origin, if they left their home country and applied for asylum in Austria together. This can definitely be pointed out as a good practice

However, a report from UNHCR from 2011 found the first questioning conducted by the police often inaccurate. During this study, in every surveyed case serious mistakes in the legally required protocol were found: The data gathered was partly incorrect or not at all written down. In none of the surveyed cases did the interview transcription correspond directly with the asylum applicant's wording. In one case, an unaccompanied minor said the whole family lived in Europe and his father's family was in Austria. The officer asked if he had a sister or another close relative here, the asylum applicant said no and in the protocol it was written that there are no relatives in the EU.[80]

If an asylum applicant can give the exact name and location in a certain Member State of a family member according to Art 2 (i-iii) Dublin II Regulation, the Dublin procedure for the asylum applicant in Austria will refer the asylum applicant to this Member State for transfer.

However, as an example there is also one case known where the asylum applicant did not know where his wife and children were at the beginning of the process. The Federal Asylum Office initiated a Dublin procedure with Poland. After four months into the procedure and after the applicant had been reverted to the Federal Asylum Office for the first time, he found out that his family was in Norway. He informed the Federal Asylum Office, but it issued another expulsion order to Poland and conducted no Dublin procedure with Norway. Eventually, after six months he was admitted to the procedure in Austria to have his asylum claim examined there, while his wife and three minor children had their

80 UNHCR: UNHCR-Beobachtung polizeilicher Erstbefragungen unbegleiteter Minderjähriger in der Erstaufnahmestelle-Ost (2011).

asylum procedure processed in Norway: during the whole asylum procedure (all together two years until he was recognised as a refugee) the family had to live separately and conduct their own asylum procedures in different Member States.

In case of unaccompanied minors, the Federal Asylum Office has to initiate a family reunification according to Art 6 Dublin II Regulation if there are known family members located in the EU. Concerning relatives who cannot be subsumed under Art 2 (i-iii) Dublin II Regulation, Art 15 Dublin II Regulation should be applicable.

In practice there are difficulties and the procedure takes a long time: There is one case where it took about six months for the asylum applicant to be transferred to his family in Germany because the German authorities wanted a DNA-test first. In another case two minor sisters from an African country who were accompanied by their aunt told in their first interview that they had a family in the UK but it took one year for them to go there because at first the Austrian authorities did not want to support their wish - although they already expressed their wish to go there during the preliminary interview.

For couples who were not married in their home country it is far more difficult to maintain their family life: In case a couple marries after the application for asylum in another Member State, it will not be regarded as family life according to the Dublin II Regulation. This practice has its legal basis in Art 5 (2) Dublin II Regulation.

3.5.3. Withdrawal of the asylum application

In Austria an asylum procedure cannot be withdrawn during an open procedure in the first instance, except for the cases in which an asylum applicant received a residential permission (§ 25/2 Asylum Law). This residential permission can in fact only be guaranteed by another Member State based on EU law because in principal asylum applicants cannot apply for a residential permission (§ 1/2/1 NAG).[81] These persons may not have a problem with their stay in Austria in case of their return.

So the only possibility to "withdraw" an asylum application in the first instance is to return to the home country voluntarily – as a

81 Niederlassungs- und Aufenthaltsgesetz; Settlement and Residence Act.

result the asylum application will be filed as baseless. If a person in this scenario returns to Austria, he / she has, according to the law, full access to an asylum procedure. However, he / she might have a problem to convince the asylum authorities that there is a risk of persecution in the home country.

If an asylum applicant "withdraws" the asylum application in the procedure in second instance, he / she has to withdraw the appeal against the Federal Asylum Office's decision, which is in force then. If a person in this scenario returns to Austria and applies for asylum once again, the application might be rejected as it is then a res judicata without a new procedure in merits.

3.5.4. Effective remedies

In principle every asylum applicant, even in case of an inadmissibility decision, cannot be deported before he / she receives a decision from the Federal Asylum Office. This decision under Dublin can be appealed within seven days. At the same time as this decision is issued there is also a decision providing for the assignment of a legal counselling organisation, which must assist the asylum applicant for free. Yet the asylum applicant may also opt to contact an NGO offering free legal advice to asylum applicants.

In such an appeal the most important claims are:

- *Procedural failures* of the Federal Asylum Office: lack of sufficient investigations for determining the Member State responsible, violation of the right to a personal interview, unsubstantiated reasoning concerning the transfer decision
- *Violations of the Dublin II Regulations*: incorrect application of the criteria, incorrect or incomplete Dublin consultations, time frames not respected by the Austrian authorities
- *Violations of national law and jurisprudence*: asylum law as well as constitutional laws including human rights

The appeal has no suspensive effect unless the Asylum Court awards it within seven days after the appeal reaches the court. The Asylum Court has to decide ex officio if the appeal is awarded suspensive effect. In many cases the asylum applicant never receives a definite decision from the Asylum Court because he / she was transferred back to the responsible Member State before it was issued. This can only happen in those cases the Asylum Court did

not award the appeal suspensive effect. Consequently, submitting a further appeal against this decision is hardly possible in cases where there is no legal representative to pursue the matter.

The Asylum Court can either refuse the appeal or decide to revert it back to the Federal Asylum Office with the binding mandate to conduct either a procedure in merits or investigate more detailed. Only in very few cases there is a hearing at the court, usually the court decides only upon the written appeal and the asylum file. In case an appeal is reverted, the Federal Asylum Office must conduct further investigations, correct the procedural failures, if possible, or conduct the procedure in merits in Austria. The Federal Asylum Office is legally bound to the Asylum Court's decision and to its exact reasoning.

In case an application for asylum is not the asylum applicant's first application in Austria, but a so-called "subsequent application" and if an inadmissibility decision was taken within the last 18 months after the first application, there is generally no suspensive effect (§ 12a/1 Asylum Law), neither for the appeal, nor by the application itself.

In case the responsible Member State's acceptance in the Dublin consultations is still open because there was not yet a transfer, or if the Member State agrees to take the asylum applicant back once more, he / she can be deported immediately without ever receiving a decision which he / she could contest. In many cases the asylum applicant does not even receive a personal interview except from the preliminary interview by the police.

Accordingly, this law, which was introduced in 2010, seems to drastically reduce the chance for an effective remedy.

3.6. Reception Conditions and Detention

3.6.1. Reception Conditions in Austria

The Basic Services Law (Grundversorgungsgesetz Bund, BGBl Nr. I 00/2005) guarantees the asylum applicants at the admissibility stage, including potential Dublin applicants, their social rights – regardless of the federal state in which they are accommodated. Asylum applicants in the procedure in merits are accommodated in the Federal States of Austria - the social rights in the federal states are legally regulated in the relevant federal state's law.[82] The allocation of the asylum applicants to the federal states is conducted by the coordination unit (Koordinationsstelle) in accordance with the government of the relevant federal state; the asylum applicant cannot choose where he / she wants to be located.

To ensure a certain amount of standardisation of the reception conditions for asylum applicants in the whole country, Art 15a B-VG (Bundesverfassungsgesetz, BGBl Nr 80/2004)[83] gives a legal framework for the federal states law. Still, in practice there are varying reception conditions in the federal states; there are very good asylum hostels with qualified social workers dealing with the asylum applicants as well as accommodation which are a danger to the asylum applicant's health and security and where they suffer from inhuman treatment.[84]

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82 Burgenland: Burgenländisches Landesbetreuungsgesetz (LGBl Nr 42/2006; Carinthia: Kärnter Grundversorgunggesetz (LGBl Nr 43/2006); Lower Austria: Niederösterreichisches Grundversorgungsgesetz; Upper Austria: Oberösterreichisches Grundversorgungsgesetz (LGBl Nr 12/2007); Salzburg: Salzburger Grundversorgungsgesetz (LGBl Nr 35/2007); Styria: Steiermärkisches Betreuungsgesetz (LGBl Nr 101/2005); Tyrol: Tiroler Grundversorgungsgesetz (LGBl Nr 21/2006); Vorarlberg: none, refers directly to Art 15a B-VG; ViennaWiner Grundversorgungsgesetz (Asylwerber, Asylberechtigte, Vertriebene und andere aus rechtlichen oder faktschen Gründen nicht abschiebbare Menschen) in Wien (LGBl 46/2004, 56/2010).

83 In English: Federal Constitutional Law.

84 Steiner: Asylheim: Schmutzige Klos, undichtes Dach, bröckelnde Wände (derstandard.at, 24.07.2012) http://derstandard.at/1342947520037/Asylheim-Wernberg-Schmutzige-Klos-undichtes-Dach-broeckelnde-Waende (29.07.2012)
Steiner: «Ausgrenzung und Bestrafung» auf der Saualm (derstandard.at, 10.07.2012) http://derstandard.at/1341844966064/Ausgrenzung-und-Bestrafung-auf-der-Saualm (29.07.2012)
Brickner: Asylheime im Burgenland: «Die Wirte gehen mit uns diktatorisch um

As concerns material conditions in reception centres for asylum-seekers, the Commissioner for Human Rights of the Council of Europe visited the Federal Reception Centre East at Traiskirchen, where the basic needs of asylum seekers were met. This appeared to be generally confirmed by those residents, including a number of adolescent boys mostly from Afghanistan, with whom the Commissioner spoke. At the Centre, the Commissioner also met with unaccompanied asylum-seeking children, families and single mothers. Single mothers, women and small children lived in a separate guarded house. A kindergarten with five female nursery teachers was available during the day for small children providing for several activities. However, it has been reported to the Commissioner that conditions vary substantially across the centres in the Federal States, where asylum-seekers are transferred after the initial phase to await a decision on the merits of their application.

Reports of inadequate living conditions in some of these centres have reached the Commissioner.[85]

The right to basic social services for all asylum applicants in an admission procedure as well as those in an admission procedure include health insurance, pocket money, food, certain measures for persons with special needs (especially medical problems), financing of transport costs for obeying a summon and repatriation advice.

A precondition for basic social services is that the person is in need of protection: Every asylum applicant is presumed to need this assistance unless there are indicators to the contrary. These indicators are for instance a formal obligation by a person who invited the asylum applicant to Austria or any kind of funds the asylum applicant has in Austria. Hence he/she has the right to benefit from these social services until he / she leaves Austria again, even if the application has already been rejected based on the Dublin II Regulation.[86]

(derstandard.at, 01.08.2012)
http://derstandard.at/1343743617654/Asylheime-im-Burgenland-Die-Wirtsleute-gehen-mit-uns-diktatorisch-um (12.08.2012)

85 Muižnieks: Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Austria from 4 to 6 June 2012 (2012), 7.

86 Schumacher/Peyrl: Fremdenrecht³ (2007), 217 ff.

However, concerning persons who have no longer a legal stay in Austria because the asylum procedure was refused based on a procedure in merits, some federal state's law[87] does not grant basic services any more in case the asylum applicant does not want to return to his / her home country voluntarily and takes the relevant steps to leave Austria as soon as possible.

Asylum applicants in the admissibility procedure (such as asylum applicants in a Dublin procedure) are located in different living quarters[88] than asylum applicants in a procedure based on merits, but hold the same rights regarding social welfare as described above.

The asylum applicant's right to basic social services can be lost or restricted easily.[89] The right to receive basic medical service in emergency situations, on the other hand, cannot be restricted. Reasons for the removal of the right to basic social services are among other things the serious and continuous violation of the accommodation's "house rules", a subsequent application for asylum within six months after the refusal of the previous application, the refusal of cooperation during the asylum procedure,[90] the unjustified removal from the accommodation for more than three days, the refusal to take residence in the accommodation which is provided, the refusal of medical treatment although the concerned disease threatens the health of other residents.

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87 Lower Austria: § 3/2 NÖ Grundversorgungsgesetz; Carinthia: § 3a/1/j Kärntner Grundversorgungsgesetz.

88 Bundesbetruungsstelle Ost (reception centre east), Traiskirchen, Lower Austria; Bundesbetreuungsstelle Süd (reception centre south), Reichenau/Rax, Lower Austria; Bundesbetreuungsstelle West (reception centre west), Thalham, Upper Austria Bundesbetreuungsstelle Nord (reception centre nord), Bad Kreuzen, Lower Austria.

89 See § 2/4-5 and § 3 Grundversorgungsgesetz Bund; § 3/2 and § 5/3-4 Burgenländisches Landesbetreuungsgesetz; § 3a Kärntner Grundversorgungsgesetz; § 8 Niederösterreichisches Grundversorgungsgesetz; § 3 Oberösterreichisches Grundversorgungsgesetz; § 9 Salzburger Grundversorgungsgesetz; § 5 Steiermärkisches Betreuungsgsetz; § 5/2-4 Tiroler Grundversorgungsgesetz; § 1/5 Wiener Grundversorgungsgesetz

90 For instance repeatedly ignoring summons at the Federal Asylum Office.

3.6.2. *Detention of Asylum Seekers in Austria*

Practice concerning the detention of asylum applicants varies a lot regarding regional practice and is regulated in Fremdenpolizeigesetz from 2005 (FPG; Foreigners Police Act), which was also reformed several times since it was set in force.

There is a possibility to put a person in a detention centre for several reasons which are provided for, in § 76 Foreigners Police Act (Fremdenpolizeigesetz)[91] – It is limited to those cases where it seems necessary to safeguard the examination of the applicant's asylum claim or to undertake the Dublin transfer:

- In case there is an inadmissibility decision which can be executed, even if it is not yet in force;[92] this means in fact that Federal Asylum Office has already issued an inadmissibility decision but is still pending logistical enforcement
- In case an inadmissibility procedure is being undertaken; this means in case the asylum applicant received information indicating that the Austrian Authorities were consulting other MS's to see if another Member State was responsible under Dublin
- In case a return decision, a residence prohibition or an expulsion order was issued before the application of asylum and can be executed
- In case it seems likely that there will be a inadmissibility decision based on various kinds of evidence
- In case an inadmissibility decision was already issued or when the asylum applicant did not have an actual protection against deportation (see also *f. Effective Remedy*) during the asylum procedure
- In case an asylum applicant who had been informed that his claim was the subject of Dublin consultations violates the territorial restriction
- The territorial restriction[93] requires the asylum applicant during the admission procedure[94] to stay in the county he is formally registered by the authorities. His / her stay outside of the county is tolerated if it is necessary to fulfil

91 Fremdenpolizeigesetz 2005: Texte, Materialien, Judikatur6 (2011), 201 ff.
92 In German: «Durchsetzbarkeit der zurückweisenden Entscheidung».
93 § 12/2 Asylum Law.
94 Concerning the term «admission procedure» see chapter 2.

legal duties, to obey a summons at a court or administrative authority, or in cases it is necessary for medical treatment.

- In case an asylum applicant registered as homeless violates the duty to report to the police on a regular basis more than one time or does not report that he is registered as homeless to the police within two weeks while he is in an admission procedure.

If a person is taken to a detention centre at an early stage of his procedure it is mostly because of his/her behaviour in the past and his / her individual characteristics: if the asylum applicant previously absconded or is likely to do so/ if the asylum applicant was in several other Dublin Member States before; if the asylum applicant gave identical personal data in the Member States; if it is a subsequent application; if it is a family or a single person; if the asylum applicant confirms their travel route to Austria. In practice there seems to be an unequal treatment of the different ethnicities. Detention is almost systematic during the 24 hours preceding an asylum applicant Dublin Regulation transfer to the responsible Member State.

There are due to the parliamentary interpellation XXIV.GP.-NR 10892/AB from 16.05.2012 cases where persons in a Dublin procedure were detained for six months.

When a person is placed in detention, he / she must receive a decision relating his/her individual situation and the circumstances leading to detention. The main parts, which are the verdict of detention and the information about the right to appeal against detention, have to be in a language the asylum applicant is able to understand. In each case the detained asylum applicant is granted a legal advisor provided by the state, either from the organisation ARGE Rechtsberatung or Verein Menschenrechte Österreich. This organisation closely co-operates with the Ministry of the Interior.

Reports from UNHCR[95] harshly criticise the work of Verein Menschenrechte Österreich: Those asylum applicants whose case was handled by this organisation had hardly any idea about the status, the progress and past of their asylum procedure as well as the measures taken. Additionally, the way in which the possibility of a voluntary return (which is also provided by Verein

95 UNHCR: „Monitoring" der Schubhaftsituation von Asylsuchenden (2008).

Menschenrechte Österreich) was handled, gave a strong impression that these organisations work very differently: Asylum applicant who returned with Verein Menschenrechte Österreich mostly said that they could not stand remaining in a detention centre any longer or that they feared a subsequent refoulement from another EU Member State to their home country which would draw on them much more attention than a voluntary return. The others reported that after the evaluation of their situation and information from Verein Menschenrechte they came to the conclusion that they had no chance to receive a legal status in Austria.

There is a possibility to submit an appeal to Unabhängiger Verwaltungssenat (UVS; Independent Administrative Board) against detention. UVS must decide within seven days in cases where a person is still detained and within six months in cases where he/she is no longer detained.[96] In case the appeal is rejected there is a possibility to submit an appeal to the Administrative Court and to the Constitutional Court. If the detention or its duration are recognised as illegitimate by UVS, the asylum applicant is entitled to a financial compensation of € 100.- per day.

The detention conditions are even worse than in common law prisons have been criticised by Human Rights Advisory Board (Menschenrechtsbeirat)[97] and UNHCR[98]. Concerning detention conditions for minors, Menschenrechtsbeirat[99] has criticised the fact that children under 14 years are kept in detention centres with their family when the parents agree to keep the child with them in the detention centre rather than being separated from them. While unaccompanied minors are separated from grown up persons in the detention centre, they are often kept alone in their cell which has very negative psychological consequences.

However, there was a small improvement in 2010: there is a now a special detention centre for unaccompanied minors and families, which is located in a house formerly sheltering recognized refugees. The whole family waits for deportation in an apartment,

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96 Illegitimate detention still shall be challenged although the asylum applicant is already released because the asylum applicant has a right to financial compensation in case the detention is recognized as illegitimate.

97 Menschenrechtsbeirat: Haftbedingungen in Anhalteräumen der Sicherheitsbehörden (2009).

98 UNHCR: „Monitoring" der Schubhaftsituation von Asylsuchenden (2008).

99 Menschenrechtsbeirat: Bericht des Menschenrechtsbeirates zu Kindern und Jugendlichen im fremdenrechtlichen Verfahren (2011).

without the possibility of leaving it while previously the family was usually separated from the father.

The Commissioner of Human Rights of the Council of Europe point out that numbers of rejected asylum-seekers and other persons kept in pre-deportation detention remain high in Austria. Many persons awaiting their expulsion are still being held, in some cases for months, in police detention centres which have been regularly criticised for their material conditions. Regular inspections by different bodies have noted some improvements but limited access to legal counsel and very limited possibilities for occupational activities have remained areas of concern.[100]

3.7. Member State Co-operation

3.7.1. Co-operation in the Dublin Procedure

Cooperation with the other Dublin states seems to be a serious problem in several cases.

There are cases documented, where Austrian authorities willingly misinformed the Dublin units of the seemingly responsible state to trick them into an acceptance of the request. This can be illustrated by the following cases:

- In a case concerning a woman who followed her husband to Austria, passing Poland, the Austrian Dublin unit did not inform Poland about the fact that she is married to a man who is a refugee in Austria. The Federal Asylum Office expelled her to Poland, she appealed against the decision and finally the Asylum Court (AsylGH 10.02.2009, S1 404.238-1/2009/2E) stated:

  ... Austria never informed Poland, that the claimant said that her husband lives in Austria as a refugee. So the consultation procedure is suffering from grave insufficiencies. These obvious violations of good cooperation and bona fides can lead to an invalidity of

100 Muižnieks: Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Austria from 4 to 6 June 2012 (2012), 8.

the acceptance if they are only known at the time of appeals procedure. [...] If the Member States lead a consultation procedure in a way that manifestly violets legal principles of the Dublin II Regulation, a decision according to Art 19 (1) regulation 343/2003 cannot be valid. It cannot be excluded that Poland would have refused Austria's request knowing that she is married to a refugee. [...] Based on that the Federal Asylum Office's decision has to be cancelled.

- Very similar was the case of a family with four minor children who had subsidiary protection in Austria, then returned to Chechnya but came back very soon via Poland – still having the status of subsidiary protection. Austria's Federal Asylum Office expelled them to Poland, although they had a right to stay in Austria. In This case the Asylum Court (AsylGH 20.01.2012, S23 242.800-3/2012/4E and others) stated:

  First of all it has to be stated that Poland explicitly agreed to take back the claimant on 09.09.2011 due to Art 16 (1) (c) Dublin II Regulation. In this context there is a procedural error. It would have been necessary to inform Poland in the request that the claimant has [...] the status of subsidiary protection. Based on the duty to make a transparent consultation procedure, which allows Poland to decide on the case, the lack of information is a fundamental error.

  The Dublin II Regulation requires a good cooperation based on trust between the Member States. This includes an exchange of fundamental information concerning the examination of the responsibility for the conduction of an asylum procedure. [...]

  The Federal Asylum Office led the consultation procedure in an arbitrary way. It did not inform Polish Dublin authorities that the claimant has the status of subsidiary protection in Austria. This lack of information makes the consultation procedure illegitimate because it is a breach of trust between the Member States of the Dublin II Regulation. Based on that breach of trust Polands acceptance is invalid.

- Finally, another case of arbitrary retention by Austria's Federal Asylum Office led to Hungary accepting an asylum applicant, although he entered Europe first in Greece and applied for asylum there. After he appealed against the inadmissibility decision and the expulsion to Hungary the Asylum Court (AsylGH 03.02.2012, S1 424.088-1/2012/2E) stated:

  Based on the lack of information in the take back request to Hungary in a central issue, the application for asylum in Greece, the consultation procedure was led in an arbitrary way. Hungary's acceptance cannot be valid under these circumstances.

3.7.2. *Formal and informal Co-operation*

There are formal contract-based co-operations between Austria and other Member States. In the field of Dublin II there are agreements with Hungary,[101] the Czech Republic,[102] Bulgaria,[103] Romania[104] and Switzerland.[105]

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101 BGBl III 150/2005: Verwaltungsvereinbarung Zwischen der Bundesregierung der Republik Österreich und der Regierung der Republik Ungarn über die Zusammenarbeit im Interesse der Anwendung der Verordnung (EG) Nr. 343/2003 des Rates der Europäischen Union vom 18. Februar 2003 https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2005_III_150/COO_2026_100_2_219577.pdf

102 BGBl III 84/2006: Verwaltungsvereinbarung zwischen der Bundesregierung der Republik Österreich und der Regierung der Republik Ungarn über die Zusammenarbeit im Interesse der Anwendung der Verordnung (EG) Nr. 343/2003 des Rates der Europäischen Union vom 18. Februar 2003 https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2006_III_84/COO_2026_100_2_268258.pdf

103 BGBl III 113/2007: Verwaltungsvereinbarung zwischen dem Bundesministerium für Inneres der Republik Österreich und dem Ministerium für Inneres der Republik Bulgarien über praktische Modalitäten zur erleichterten Anwendung der Verordnung (EG) Nr. 343/2003 des Rates vom 18. Februar 2003 zur Festlegung der Kriterien und Verfahren zur Bestimmung des Mitgliedstaates, der für die Prüfung eines von einem Drittstaatsangehörigen in einem Mitgliedstaat gestellten Asylantrages zuständig ist https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2007_III_113/COO_2026_100_2_377066.pdf

104 BGBl III 34/2008: Verwaltungsvereinbarung zwischen dem Bundesministerium für Inneres der Republik Österreich und dem Ministerium für Inneres und Verwaltungsreform von Rumänien über praktische Modalitäten zur erleichterten Anwendung der Verordnung (EG) Nr. 343/2003 des Rates vom 18. Februar 2003 zur Festlegung der Kriterien und Verfahren zur Bestimmung des Mitgliedstaates, der für die Prüfung eines von einem Drittstaatsangehörigen in einem Mitgliedstaat gestellten Asylantrages zuständig ist https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2008_III_34/COO_2026_100_2_426964.pdf

105 BGBl III 59/2010: Vereinbarung zwischen dem Bundesministerium für Inneres der Republik Österreich und dem Schweizerischen Bundesrat, handelnd durch das Eidgenössische Justiz- und Polizeidepartement, Über praktische Modalitäten zur erleichterten Anwendung der Verordnung (EG) Nr. 343/2003 des Rates vom 18. Februar 2003 zur Festlegung der Kriterien und Verfahren zur Bestimmung des Mitgliedstaates, der für die Prüfung eines von einem Drittstaatsangehörigen in einem Mitgliedstaat gestellten Asylantrags zuständig ist https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2010_III_59/COO_2026_100_2_605172.pdf

These contracts foresee mutual exchange of information and special time-limits to answer to requests to take charge of or to take back asylum applicants. In urgent cases due to Art 17 (2) Dublin II Regulation the Dublin authorities have to declare a responsible contact person. In case a Member State intends to refuse a request to take charge or take back for the reason that another Member State is considered to be responsible, this is only possible if this Member State immediately presents the evidence which demonstrates the third Member State's responsibility. The communication shall take place via DubliNet and in English language. The agreements also contain administrative regulations concerning Dublin transfers.

Austria does not have any liaison officers from other Member States. The Federal Asylum Office does not have its own liaison officers in other Member States. However, the Ministry of Interior has police attachés in several Member States which provide support in asylum matters from time to time.[106]

These police attachés are based in Slovakia (Bratislava),[107] in Greece (Athens),[108] Slovenia (Ljubljana),[109] Hungary (Budapest),[110] Italy (Rome),[111] Spain (Madrid),[112] Bulgaria, Poland, Romania and Czech Republic.[113]

106 This information is based on an E-Mail by Mr. Peter Reich-Rohrwig from the Ministry of Interior.

107 http://www.bmi.gv.at/cms/BMI_OeffentlicheSicherheit/2012/05_06/files/Verbindungsbeamter_Handler.pdf

108 http://www.bmi.gv.at/cms/BMI_OeffentlicheSicherheit/2011/05_06/files/VERBINDUNGSBEAMTE.pdf

109 http://www.bmi.gv.at/cms/BMI_OeffentlicheSicherheit/2009/01_02/files/Verbindungsbeamte.pdf

110 http://www.bmi.gv.at/cms/BMI_OeffentlicheSicherheit/2008/03_04/files/Verbindungsbeamte.pdf

111 http://www.bmi.gv.at/cms/BMI_OeffentlicheSicherheit/2006/01_02/files/VERBINDUNGSBEAMTE.pdf

112 http://www.bmi.gv.at/cms/BMI_OeffentlicheSicherheit/2005/05_06/files/Verbindungsbeamte.pdf

113 http://www.bmi.gv.at/cms/BMI_OeffentlicheSicherheit/2010/09_10/files/VERBINDUNGSBEAMTE.pdf

In the field of readmission agreements there are contracts with

- Slovakia,[114] concerning the joint contact department at the border point Kittsee / Jarovce
- the Czech Republic,[115] concerning the establishment of a joint police centre Drasenhofen / Mikulov; in this centre the officers cooperate in the fields of exchanging information on and fight against illegal border-crossing, coordination of the activities associated with border security and the readmission of persons including asylum seekers
- France,[116] concerning the readmission of asylum seekers in a Dublin procedure

There is moreover a joint declaration on the fight against illegal migration between Hungary, Austria and Serbia since October 2011. In this declaration the States made proposals for practical measures, to strengthen the cooperation between the authorities concerning border control and migration management. Within the framework of the cooperation fast and effective identity detection of the arrested illegal migrants and the promotion of fast, safe and regular return are emphasized to be of special importance. Furthermore Frontex, Europol as well as the Serbian border guards are included in these activities to detect illegal migration activities along the Hungarian-Serbian border.[117]

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114 BGBl III 75/2008: Vereinbarung zwischen der Österreichischen Bundesregierung und der Regierung der Slowakischen Republik über die Errichtung einer gemeinsamen Kontaktdienststelle Kittsee — Jarovce https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2008_III_75/COO_2026_100_2_455619.pdf

115 BGBl III 135/2007: Vereinbarung zwischen der Österreichischen Bundesregierung und der Regierung der Tschechischen Republik über die Errichtung eines gemeinsamen Zentrums Drasenhofen — Mikulov https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2007_III_135/COO_2026_100_2_394206.pdf

116 BGBl III 117/2007: Abkommen zwischen der Österreichischen Bundesregierung und der Regierung der Französischen Republik über die Übernahme von Personen mit unbefugtem Aufenthalt https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2007_III_117/COO_2026_100_2_377133.pdf

117 Hungarian Ministry of Interior: The Interior Ministers of Hungary, Austria and Serbia signed a joint declaration on the fight against illegal migration (06.10.2011) http://www.kormany.hu/en/ministry-of-interior/news/the-interior-ministers-of-hungary-austria-and-serbia-signed-a-joint-declaration-on-the-fight-against-illegal-migration (25.09.2012)

3.8. The Impact of European Jurisprudence at National Level

In Austria, hardly any Dublin transfers have taken place since the decision *MSS versus Belgium and Greece* (App. No. 30696/09). No general and / or official suspension of transfers have been ruled, but the practice is based on an examination of each individual case.

Due to a parliamentary interpellation from the Greens to the Austrian Ministry of Interior concerning statistics in asylum procedures[118] Greece accepted to take back 494 asylum applicants in 2010 and 124 asylum applicants in 2011 from Austria. In 2010 178 asylum applicants were deported to Greece, in 2011 still two persons. This practice of a de facto stop of transfers may change again at any time, although *Filzwieser*[119] emphasized that there is no foreseeable end of this practice.

According to the literature and ECJ's decisions *C-411/10* and *C-493/10* from 21.12.2011, no transfer to this Member State should be planned if there is a real risk of a violation of Art 3 of ECHR. However not any kind of violation of the directive 2003/9, 2004/83 or 2005/85 hinders a transfer to the responsible Member State. Nevertheless systematic failures of the asylum procedure and the reception conditions which endanger the asylum applicant to find himself /herself in a inhuman or degrading treatment in case of a transfer makes it necessary to not carry out a Dublin transfer.[120]

The ECJ's decisions from 21.12.2011, C-411/10 and C-49310 were noted by the Dublin authorities and now are cited on a regular basis in transfer decisions. However, this does not result in a change of practice in Austria. Even in cases of Member States who obviously have problems with the accommodation of asylum applicants,[121] the Asylum Court argues that the situation is -

118 Parliamentary Interpellation XXIV.GP.-NR 10892/AB (16.05.2012).

119 Filzwieser: Keine Dublin-Überstellung bei systematischer Grundrechtsverletzung im Zielstaat, Migralex 01/2012, 27.

120 Filzwieser: Keine Dublin-Überstellung bei systematischer Grundrechtsverletzung im Zielstaat, Migralex 01/2012, 23 f.

121 For instance Italy: There is evidence that Italy cannot ensure the protection of the rights of refugees. The capacities to accommodate are overload, there is a serious risk of being homeless. There is a lack of food, clean water and electricity as well as problems with ensuring the health care. (See decision from Administrative Court Düsseldorf, Germany, from 23.05.2012, 21L851/12a; see also).

although the situation is criticised - not as bad as it is in Greece, there is no conviction of the responsible Member State by the ECHR and there is no general UNHCR recommendation against transfers to Italy either.[122]

The reason for this is Austria's interpretation of the ECJ's decisions from 21.12.2011, C-411/10 and C-49310: even before these decisions there was, different than in Member States like Germany, an individual examination of the concrete situation of the asylum applicant's part of the regular Dublin procedure in Austria. So the central requirement of considering the individual situation was already part of the Austrian asylum system.[123]

The Federal Asylum Office often takes an inadmissibility decision more than once – which affects the time frame as stated in of Art 19 (4) Dublin II Regulation by restarting it each time[124] – which leads to Dublin procedures to take one year or even longer before there is finally a procedure based on merits or a final inadmissibility decision. This practice is a result of the ECJ's decision in the case of *Petrosian ECJ 29.01.2009, C-19/08).*

Before that, a "punishment" of the asylum applicant was extending the time of the Dublin procedure. Although the Federal Asylum Office's inadequate investigation was refused by the Asylum Court, the time frame was only interrupted for the time of the suspensive effect.[125]

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122 See AsylGH 14.06.2012, S1 427.051-1/2012/2E; AsylGH 25.05.2012, S1 426.741-1/2012/3E; AsylGH 14.05.2012, S7 426.336-1/2012/2E; VfGH 02.03.2012, U 83/12-6 and others (concerning the situation in Italy).
See AsylGH 25.05.2012, S3 422.118-2/2012/5E; AsylGH 02.05.2012, S7 426.008-1/2012/3E; AsylGH 29.03.2012, S3 422.460-2/2012/7E and others (concerning the situation in Hungary).

123 Filzwieser: Keine Dublin-Überstellung bei systematischer Grundrechtsverletzung im Zielstaat, Migralex 01/2012, 23 f.

124 See AsylGH 19.01.2010, S17 305.378 to 381-5/2009; AsylGH 30.06.2009, S13 315.364-3/2009/5E and others.

125 See AsylGH 06.02.2009, S12 400.552-2/2009/5E; AsylGH 24.09.2008, S12 318.568-1/2008/2E; and others.

3.9. Good Practices in Austria

The application of the humanitarian clause partly has (for critics see chapter 4) aspects of good practice. Asylum applicants who enter Austria together and lived in the country of origin in the same household are treated as family members although the family life cannot be subsumed under Art 2 lit i sublit i-iii Dublin II Regulation. This applies especially in cases of grown up children and their parents[126], grown up siblings[127] and persons who are not married according to civil law, but only in accordance with their respective traditions. As a consequence, the practical use of the definition of family members for this group of persons is wider and fully accords with recital 6 of the directive which states that the family unity should be preserved.

126 See AsylGH 02.05.2012, S1 424.394-1/2012/3E; AsylGH 13.09.2010, S2 415.203 and 204 to 207-1/2010; and others.

127 See AsylGH 19.03.2012, S6 425.305 and 306-1/2012.

4 Conclusion and Recommendations

In Austria the **humanitarian clause** is in fact hardly ever used: Even parents are separated from their minor children in case the family live was founded at a time where they could not expect to continue their family life in Austria - regardless the status of the family members in Austria and the responsible Member State. The chances of a family reunification are very low after a Dublin transfer.

The standard of Art 15 Dublin II Regulation to maintain the family unity of grown up descending and ascending family members is hardly ever used. The separation of parents and their grown up children in case a Dublin-procedure takes place on a regular basis if they do not enter Austria together - regardless the status of the family members in Austria and the responsible Member State.

The humanitarian clause of Art 15 Dublin II Regulation and the 6th preamble which stresses the importance of the preservation of the family unity are reduced to the strict use of Art 8 of ECHR, without taking into account that the Dublin II Regulation obviously does not intend to separate families which cannot be subsumed under the term of the traditional nuclear family. The broader use of the humanitarian clause also seems not to oppose public order - as the asylum authorities argue - because the admission to an asylum procedure in merits does not mean that a person can stay indefinite in Austria: at the end of an asylum procedure in merits there is an expulsion order legally provided in case it is no violation of Art 8 of ECHR.

A broader use of the humanitarian clause is strongly recommended to conduct the Dublin procedures in accordance with the Dublin II Regulation.

Procedures for a family reunification usually take very long time (see chapter 3.4.). These procedures shall be handled prioritised.

According to the **information** provided in chapter 3.5. asylum applicants is for several reasons not efficient: The information is difficult to understand and measures for illiterate persons are hardly taken. The information sheets are not systematically handed out to the asylum applicant before the preliminary interview.

It is recommended to completely update the information sheets provided to the asylum applicants regarding the comprehensibility and suitability also for asylum applicants with a low or a complete absence of education. These information sheets shall furthermore be handed out more systematically before the preliminary interview.

Concerning the legal advisors who have in principal the purpose to give further information to the asylum applicant concerning the asylum procedure and the Dublin procedure itself it must be pointed out that the quality of this advisory is inconsistent (see chapter 3.5.).

It is recommended to evaluate the quality of the legal advice provided by the legal advisors to the asylum applicants by an independent body and appropriate countermeasures in case of a systematic pattern of disinformation could help to improve the situation.

Transfer practice in Austria seems to violate Art 19 (2) Dublin II Regulation. Art 19 (2) states clearly that the transfer decision *shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means.* In general Austria uses mainly forced transfers, including at least 24 hours in a detention centre, even without an attempt of a voluntary transfer.

It is recommended to strengthen the practice of voluntary transfers to the responsible Member States, especially in cases of families or at the transfer of minors.

At the moment the **preliminary interview** is conducted by an armed and uniformed police officer. In this interview the asylum applicant has the legal obligation to tell the police officer every reason why he / she left his / her country of origin. Reasons presented at a later stage of the asylum procedure (including Dublin procedure) might be considered to be untrue.

It seems problematic that asylum applicants, especially those who faced severe persecution and / or torture by the authorities of their country of origin and who are heavily traumatised are

questions by police officers. It is comprehensible that in that certain situation many asylum applicants do not yet trust the police and therefore will not explain the whole situation in detail in the first interview.

Furthermore this preliminary interview mainly deals with questions concerning the route to Austria. Only in the end of this interview, which lasts usually about one hour, there is one question about the reason why the asylum applicant left his / her country of origin. The police officers are due to a former coordinator of the Menschenrechtsbeirat, (Human Rights Board), Dr. Georg Bürstmayr,[128] explicitly advised to not ask any further questions.

It is recommended to change the practice of conducting the preliminary interview with armed and uniformed police officers.

The **legal protection** of the rights of asylum applicants in the Federal Asylum Office, especially in the reception centres which are responsible for the conduction of asylum procedures seems very limited. This includes, in particular, a lack of examination of the relevant facts, violations of the right of party hearings and the failure to take account of the vulnerability the asylum applicant might have claimed. In several decisions the Asylum Court (see AsylGH 19.08.2010, S18 404.334) even stated a "systematic refusal" of the necessary legal protection by the Federal Asylum Office.[129] Furthermore the exchange of the relevant information with the other Member States during a Dublin procedure are not respected in several cases.[130]

A special problem seems to exist for so-called subsequent applications. As described in chapter 2.3.f. persons who were in a Dublin procedure before and who apply for asylum more than once within 18 months after the decision from their first asylum procedure

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128 http://derstandard.at/1341844953536/Natuerlich-wird-in-Asylverfahren-gelogen (29.07.2012).
«Dazu kommt, dass es bei dieser Erstbefragung ja um die Fluchtgeschichte gar nicht geht. Sondern nur darum, wer er ist, woher er kommt und ob Österreich überhaupt zuständig ist. Dann wird ganz am Ende eine einzige Frage zum Fluchtgrund gestellt, und dem Beamten ist ausdrücklich untersagt nachzufragen. Der Asylwerber wird in der Regel fünf Sätze sagen, dann signalisiert man ihm eh schon: «Okay, passt schon.» Und dann kann er sich bei der zweiten Befragung anhören: «Bei der Erstbefragung haben Sie das alles aber nicht gesagt!»

129 Filzwieser: Die Anwendung des Art 3 Abs 2 Dublin-II-VO auf Griechenland, Migralex 03/2010, 82.

130 See chapter 3.7.

was in force, can be transferred to the responsible Member State without the receipt of a transfer decision they could contest.

This is a clear violation of Art 19 Dublin II Regulation, which states that *the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application.* The transfer decision *shall set out the grounds on which it is based. [...] This decision may be subject to an appeal or a review*.

In these cases neither the asylum applicant receives a transfer decision before his actual transfer, nor is in fact not able to contest it his / her actual transfer - irrespective what reasons the asylum applicant has to apply for asylum a second time. There is no possibility to apply for suspensive effect of the subsequent application. This occurs to be a severe and unjustified restriction of the legal protection of Dublin asylum applicants.

It is recommended to amend the law in such a way that the law is in accordance with Art 19 (2) Dublin II Regulation.

There seem to be a few sources of concern regarding the **quality of Dublin procedures** conducted by Austria. As mentioned before the legal protection for asylum applicants in the first instance is a serious source of concern and the reception centres who conduct the Dublin procedures have a limited understanding of the rights of the asylum applicant and his / her legal representative.[131]

The obvious deprivation of relevant information in Dublin procedures which cause wrongful acceptances by the other Member States to take an asylum applicant back,[132] are another source of deep concern and seem to be in contradiction to the good trust between the Member States.

It is strongly recommended to change that practice immediately and to install effective instruments of quality assurance in the work of the Reception Centres.

The Austrian authorities should apply the Dublin II Regulation in a manner which properly reflects the primary aim of the Regulation - to identify a Member State responsible for the examination of the asylum claim for those seeking protection. This includes the acceptance that Austria itself could be the responsible Member State.

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131 Filzwieser: Die Anwendung des Art 3 Abs 2 Dublin-II-VO auf Griechenland, Migralex 03/2010, 82.

132 See chapter 3.7.

Annexes

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- Netzwerk SprachenRechte: Stellungnahme zu den Erstinformationsblättern BAA "Erstinformation über das Asylverfahren", "Merkblatt über Pflichten und Rechte von Asylwerbern" und "Orientierungsinformation für die Erstaufnahmestelle", 2006
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B. Relevant Statistics

a. *Ministry of Interior*

The Ministry of Interior keeps statistics in a very detailed manner. There is a yearly report since 2002 as well as monthly statistic of the current year. These statistics are publicly available at **http://www.bmi.gv.at/cms/BMI_Asylwesen/statistik/start.aspx.**

There are statistics about the gender of the asylum applicants, the monthly developments compared to the past years, the most relevant countries of origin, positive and negative decisions, refoulement and Dublin cases. Concerning the Dublin cases the statistics refer only to Dublin-Out cases.

	2010	2011	31.08.2012
General asylum statistics			
Applications for asylum	11.012	14.416	12.510
Decisions in force	18.779	15.216	11.308
Dublin-Out statistics			
Refusals	325	506	-
Request to take charge	24	23	-
Information request	759	919	-
Remonstration	17	20	-
Transfers	1.361	808	-
Acceptance	1.786	1.637	-

b. *Eurostat Statistics concerning Austria*[133]

	Outgoing requests[1]		Transfers[2]		Incoming requests[3]	
	2010	2011	2010	2011	2010	2011
Belgium	28	-	0	-	219	-
Bulgaria	-	30	-	4	-	-
Czech Republic	-	0	-	0	-	6
Denmark	3	-	-	-	33	-
Germany	117	159	3868		591	604
Estonia	3	0	0	0	1	0
Ireland	0	2	0	1	9	4
Greece	-	-	-	-	3	-

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	Outgoing requests[1]		Transfers[2]		Incoming requests[3]	
	2010	2011	2010	2011	2010	2011
Spain	49	49	25	19	10	3
France	51	62	11	10	328	-
Italy	460	497	123	67	90	-
Cyprus	2	20	0	0	0	1
Latvia	2	-	0	-	0	-
Lithuania	13	21	3	3	3	1
Luxemburg	2	0	1	0	4	5
Hungary	545	-	159	-	22	19
Malta	9	9	4	1	0	0
Netherlands	29	25	6	16	147	67
Poland	-	-	-	-	14	-
Portugal	1	1	0	0	0	-
Romania	92	301	21	36	10	-
Slovenia	30	29	11	4	5	11
Slovakia	148	-	82	-	47	-
Finland	2	5	0	0	26	-
Sweden	58	-	0	-	-	116
United Kingdom	13	-	2	-	84	-
Iceland	-	-	-	-	-	-
Norway	22	32	0	0	61	55
Switzerland	96	120	42	32	445	-

c. EURODAC Central Unit statistics – successful transactions from Austria

Category I Eurodac fingerprints mean that a person was fingerprinted when he / she applied for asylum. An Eurodac II fingerprint means that a person was fingerprinted when he / she was registered while crossing the border illegally. Finally, category III Eurodac hits mean that a person was caught within a country illegally and the member state takes fingerprints to check if he / she was ever registered in another Member State as an asylum seeker.

Austria registers the most fingerprints when persons are seeking asylum. Concerning Eurodac II hits it is significant that Austria is the only Dublin Member State without an external border who has more than 100 Category II hits per year.

	2010	2011
Category 1	9.144	11.099
Category 2	125	128
Category 3	4.549	4.835
Total	13.818	16.062

C. Relevant National Case Law

Constitutional Court

- VfGH 17.06.2005, B 336/05
- VfGH 06.03.2008, B 2400/07 - B 2418/07
- VfGH 27.04.2009, U 136/08
- VfGH 21.09.2009, U 591/09
- VfGH 07.10.2010, U 694/10
- VfGH 22.09.2011, U 1734/10
- VfGH 07.03.2012, U 1558/11
- VfGH 11.06.2012, U 653/12
- VfGH 27.06.2012, U 330/12
- VfGH 27.06.2012, U 462/12

Asylum Court

- AsylGH 13.11.2009, S11 408.911-1/2009/3E
- AsylGH 28.01.2010, S1 410.743-1/2009/6E
- AsylGH 19.04.2010, S23 412.630-1/2010-10E
- AsylGH 29.07.2010, S3 403.581-3/2010/2E
- AsylGH 24.09.2010, S5 317.551-2/2010/2E
- AsylGH 11.10.2011, S7 421.632-1/2011/2E
- AsylGH 06.12.2011, S16 422.756 to 760-1/2011-5E
- AsylGH 28.12.2011, S7 423.367 to 370-1/2011/2E
- AsylGH 16.01.2012, S22 423.415-1/2011-3E
- AsylGH 20.01.2012, S23 242.800-3/2012/4E
- AsylGH 03.02.2012, S1 424.088-1/2012/2E
- AsylGH 07.02.2012, S1 424.244-1/2012/3E

Independent Administrative Board

- UVS Vienna 31.10.2012,
- UVS-01/61/15001/2012
- UVS Vienna 30.04.2012,
- UVS-01/50/5371/2012-12

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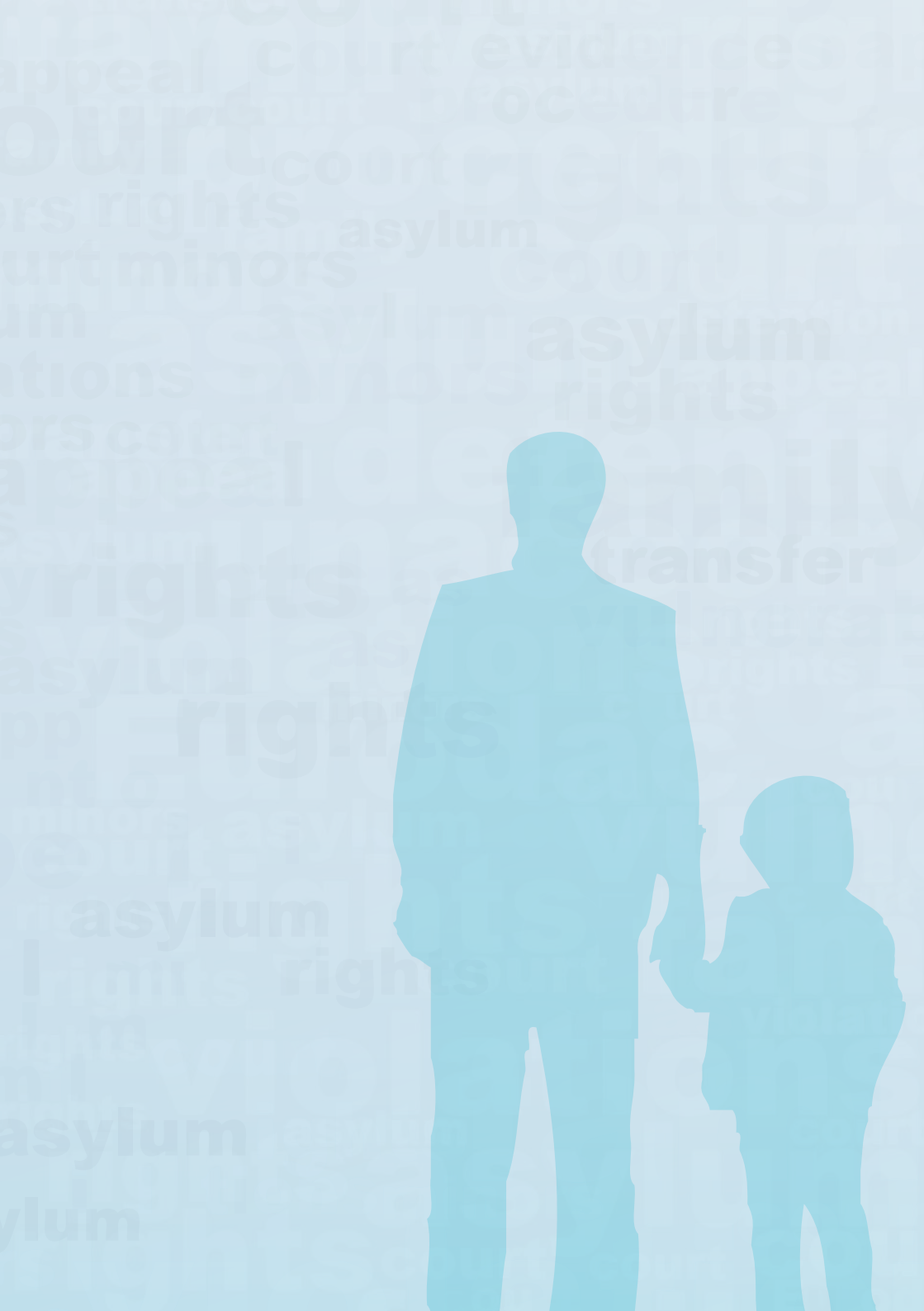

European network for technical cooperation on the application of the Dublin II Regulation

By creating a European-wide network of NGOs assisting and counselling asylum seekers subject to a Dublin procedure, the aim of the network is to promote knowledge and the exchange of experience between stakeholders at national and European level. This strengthens the ability of these organisations to provide accurate and appropriate information to asylum seekers subject to a Dublin procedure.

This goal is achieved through research activities intended to improve knowledge of national legislation, practice and jurisprudence related to the technical application of the Dublin II Regulation. The project also aims to identify and promote best practice and the most effective case law on difficult issues related to the application of the Dublin II Regulation including family unity, vulnerable persons, detention.

During the course of the project, national reports were produced as well as a European comparative report. This European comparative report provides a comparative overview of the application of the Dublin II Regulation based on the findings of the national reports. In addition, in order to further enhance the knowledge, we created information brochures on different Member States, an asylum seekers' monitoring tool and a training module, aimed at legal practitioners and civil society organisations. They are available on the project website.

The Dublin II Regulation aims to promptly identify the Member State responsible for the examination of an asylum application. The core of the Regulation is the stipulation that *the Member State responsible for examining the asylum claim of an asylum seeker is the one where the asylum seeker first entered.*

www.dublin-project.eu

European Partner Organisations:

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